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No.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD D. McVICAR, WARDEN,

Petitioner,

v.

LEE OTIS GRIFFIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

ARLEEN C. ANDERSON
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2235
Counsel for Petitioner

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QUESTION PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 on April 24, 1996. The Act's habeas corpus title, *inter alia*, amends 28 U.S.C. §2254(d). This petition presents the following question concerning the Act and amended §2254(d):

If the court of appeals correctly concluded in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), that amended §2254(d) applies to cases pending on the date of enactment and bars relief on constitutional claims decided by a state court, unless the petitioner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion, then whether the court of appeals correctly refused to apply amended §2254(d), having found that the State waived the benefits of the provision by not specifically directing the court's attention to the new Act?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
THE STATUTORY PROVISION AT ISSUE	2
STATEMENT OF THE CASE	3
A. Statement Of Facts	3
B. The Proceedings Below	8
REASONS FOR GRANTING THE WRIT:	
I. THE COURT OF APPEALS' FINDING THAT THE STATE WAIVED THE BENEFITS OF AMENDED 28 U.S.C. SECTION 2254(d) IS NOT CONSISTENT WITH THIS COURT'S DECISIONS IN *SUMNER v. MATA* AND *LOUISVILLE & NASHVILLE R. CO. v. MOTTLEY*	12
A. If the Court of Appeals Was Correct With Respect To Its Holdings in Connection With Amended Section 2254(d) in *Lindh v. Murphy*, Then the Court Erred in Not Applying the Provision To the Case at Bar	12
B. Had the Court of Appeals Not Held that the State Waived the Benefits of Amended Section 2254(d) and Applied the Provision in this Case, the Result of its Opinion on the Merits Would Have Been Different	14
CONCLUSION	17
APPENDIX	*infra*

TABLE OF AUTHORITIES

Cases: PAGE(S)

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 14

Burger v. Kemp, 483 U.S. 776 (1987) 16

Cuyler v. Sulllivan, 446 U.S. 335 (1980) 9

Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996) . 13

Gray v. Director, Department of Corrections, 721 F.2d 586 (7th Cir. 1983) 8, 9

Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (*en banc*) ..... *passim*

Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) 13

People v. Griffin, 109 Ill.2d 293, 487 N.E.2d 599 (1985) 5, 15, 16

Sumner v. Mata, 449 U.S. 539 (1981) 13, 14

United States v. Cirrincione, 780 F.2d 620 (7th Cir. 1985) 8

United States ex rel. Cole v. Lane, 752 F.2d 1210 (7th Cir. 1985) 8

Watkins v. Meloy, 95 F.3d 4 (7th Cir. 1996) 13

Statutes:

28 U.S.C. Section 2254(d) ..... *passim*

Petitioner Richard McVicar, Warden, respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the grant of habeas corpus relief.

OPINIONS BELOW

The May 14, 1984, decision of the Illinois Appellate Court, affirming Respondent Griffin's conviction, is published at 124 Ill. App. 3d 119, 463 N.E.2d 1055 (5th Dist. 1984). The May 14, 1984, decision of the Illinois Appellate Court, reversing the denial of post-conviction relief, is published at 124 Ill. App. 3d 169, 463 N.E.2d 1063 (5th Dist. 1984). The December 20, 1985, decision of the Illinois Supreme Court, reversing the State appellate court's decision with respect to post-conviction relief, is published at 109 Ill. 2d 293, 487 N.E.2d 599 (1985). The September 23, 1993, decision of the United States District Court for the Southern District of Illinois, denying habeas corpus relief, is unpublished. The November 14, 1994, decision of the United States Court of Appeals for the Seventh Circuit, remanding the case back to the district court, is reported at 40 F. 3d 170 (7th Cir. 1994). The May 3, 1995, decision of the district court, granting habeas corpus relief, is unpublished and reprinted in the appendix to this petition. The May 21, 1996, decision of the Seventh Circuit is published at 84 F. 3d 880 (7th Cir. 1996), and reprinted in the appendix to this petition.

JURISDICTION

The court of appeals issued an opinion affirming the district court's granting of the writ of habeas corpus on May 21, 1996. Petitioner filed a petition for rehearing with suggestion for rehearing *en banc* on June 4, 1996. On September 23, 1996, the court of appeals denied that petition. (App. 29). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

THE STATUTORY PROVISION AT ISSUE

This case puts in issue §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE

A. Statement of Facts

Respondent Lee Griffin, along with co-defendant Jimmy Lee Smith, was convicted in June of 1981 of the shooting murders of Charles Sims, Christi Smith and Ronald Walker and of the serious wounding of Charles Kellick. Three men were identified by witnesses as having been involved in the shootings—Lee Griffin, Jimmy Lee Smith and Will Hudson, who was never apprehended. (App. 2). Griffin was initially represented by attorney Ralph Derango. He apparently told Derango that although he had walked in during the shooting, he had not been involved. (App. 2). On this basis, Derango approached the police and attempted to negotiate a deal for Griffin. Derango's negotiation offers were rejected and, Griffin's family retained another attorney, Marvin Goldenhersh, to represent Griffin. (App. 2). Goldenhersh was also retained by Griffin's family to represent Jimmy Smith. (App. 2).

Goldenhersh moved to sever the trials of the two defendants on grounds that Jimmy Smith's extensive criminal record might prejudice Griffin and that either could have made admissions which could prove damaging to the other. (App. 2-3). The motion to sever was denied.

When questioned by the trial judge, Goldenhersh assured him that there was no conflict of interest in his joint representation of Griffin and Smith. (App. 3). The issue was raised a second time by the prosecutor just prior to trial. (App. 3). The case, however, proceeded to trial without further inquiry into the matter.

Griffin's conviction was affirmed on direct appeal. *People v. Griffin*, 124 Ill. App. 3d 119, 463 N.E.2d 1055

(5th Dist. 1984). He also filed a series of post-conviction petitions in state court. The proceedings relevant to this petition are summarized below.

In 1982, Griffin filed a petition for post-conviction relief under the Illinois Post-Conviction Hearing Act in which he alleged that he had told his trial counsel, Marvin Goldenhersh, that he arrived at the crime scene after "the argument had started," but had not taken part in the shootings as had his co-defendant Jimmy Smith. (C. 261-63). Griffin further alleged that Goldenhersh, who he claimed was already representing Smith when he retained him, advised him that if he admitted he was at the crime scene, he would be found guilty on an accountability theory. (C. 264). According to Griffin, he thought this advice over and, after discussing it with Smith who could not testify because of his criminal record, decided to make up an alibi for the two of them. (C. 252). On cross-examination, Griffin admitted that Goldenhersh never advised him to come up with the alibi. (C. 267).

In his ruling, the post-conviction judge stated that he did not know whether Griffin was telling the truth or not, but that notwithstanding, he felt Griffin had been afforded a defense according to his own testimony under oath, and that the defendants had not presented antagonistic defenses. (C. 280-81).

The state appellate court reversed the circuit court's denial of the post-conviction petition. *People v. Griffin*, 124 Ill. App. 3d 169, 463 N.E.2d 1063 (5th Dist. 1984). Noting that "it may be unlikely" that Griffin repeated to Goldenhersh the innocent bystander story he told his first attorney, a majority of the panel found that nothing in the record indicated that Goldenhersh was provided

any fact inconsistent with the alibi defense. 124 Ill. App. 3d at 179, 463 N.E.2d at 1070. Nonetheless, the majority found that a conflict had manifested itself during trial when State witnesses were inconsistent in the details concerning Griffin's presence at the crime scene and involvement in the shootings, but not as to Smith's. The court reasoned that Goldenhersh was unable to stress this without harming Smith's interests. 124 Ill. App. 3d at 181, 463 N.E.2d at 1071-72.

The Illinois Supreme Court allowed the State's petition for leave to appeal and reversed the appellate court, finding that the trial court's findings in connection with the post-conviction petition should not have been disturbed. *People v. Griffin*, 109 Ill. 2d 293, 487 N.E.2d 599 (1985). The state high court rejected Griffin's contention that an actual conflict of interest developed when his trial lawyer told him that he could be found guilty on an accountability theory if he admitted to being at the crime scene, even if he had not actually been involved in the shootings. The court found that no actual conflict was apparent from the record because Griffin testified to a common alibi for himself and Smith, and it refused to credit Griffin's assertion that he had even told Goldenhersh the "present but innocent" story, finding it more likely that when Griffin fired his first lawyer who was attempting to negotiate a deal on the basis of the "innocent bystander" theory, he simply abandoned that theory in favor of the alibi defense. 109 Ill. 2d at 303, 304, 487 N.E.2d at 603.

Griffin later filed a second post-conviction petition, alleging that State witness Charles Kellick had perjured himself, that the State had knowingly used the perjured testimony, and that the State had systematically exclud-

ed all black jurors from the jury. At the hearing on this petition, Griffin testified that his first attorney, Mr. Derango, had initially tried to negotiate a lesser charge with the chief officer investigating the case. (Transcript from hearing at 42-43). Griffin also testified that the officer went to his family's home and told them he had spoken to the attorney, but that he "wasn't going for" the offers. (Transcript from hearing at 43). According to Griffin, "[t]his frightened me and it frightened my family and Mr. Derango was released from representing me . . . ." (*Id.*) After previously testifying at the hearing on his first post-conviction petition that Goldenhersh had not advised him to come up with an alibi, Griffin this time testified that after firing Derango, he hired Goldenhersh who instructed him to testify a certain way at trial. (*Id.*). This post-conviction petition was denied but never appealed.

In 1991, Griffin filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Illinois. In the petition, he alleged that an actual conflict of interest existed in that Goldenhersh undertook representation, knowing that Griffin's first attorney had initiated plea negotiations and, instead of continuing those negotiations which he now contended were "ongoing," Goldenhersh, after being told by Griffin that he had not been involved in the shootings but had been at the crime scene, erroneously advised him that he would be found guilty on an accountability theory if he even admitted to just being at the scene. During the habeas proceedings, Griffin's counsel deposed Goldenhersh, whose recollection on many details was sketchy after 11 years. Goldenhersh did persist, however, in maintaining that he was first retained by Griffin's family

for Griffin himself, and that Griffin had insisted that the alibi which he testified to at trial was the truth. (Deposition at 26, 29). He also thought that he had discussed the issue of accountability with Griffin, but unequivocally asserted that he would not have told Griffin or "anybody else" that simply admitting presence at the crime scene would result in a guilty verdict based on accountability. (Deposition at 23-24).

After an evidentiary hearing at which Griffin testified, the magistrate judge entered an order denying the petition and made the following findings of fact:

> It is unquestioned that when first apprehended and while represented by attorney Ralph Derango, the petitioner attempted to strike a bargain with the East St. Louis detectives. In making this offer, the petitioner claimed he was at the scene of the crimes but did not participate and knew the identity of the killer. This offer was not acted upon since the detectives had already developed information which put the petitioner at the scene and allegedly shooting one of the victims. Thereupon, Mr. Derango was discharged as counsel and Marvin Goldenhersh was retained to represent the petitioner and his co-defendant.
>
> After being retained, Mr. Goldenhersh interviewed the petitioner and his co-defendant. During the interview, the facts pertaining to an alibi defense were given to Marvin Goldenhersh as the petitioner's attorney. In his deposition, Marvin Goldenhersh stated that only facts relating to the alibi defense were given to him while preparing for trial. Mr. Goldenhersh further stated that he never discussed the theory of accountability with the petitioner and did not tell him that he would be found guilty if he admitted being at the scene. In his video deposition,

> Mr. Goldenhersh denied that the petitioner had given him any facts which would have suggested his presence at the crime scene or which would have suggested an antagonistic defense. Accordingly, at trial, Mr. Goldenhersh presented the alibi defense and, consistent with that defense, cross-examined witnesses in support of that theory.

(September 23, 1993 opinion at 10-11).

Upon Griffin's appeal to the court of appeals, the case was remanded back to the district court with instructions for "a more searching examination of the record consistent with [this Court's] opinion." *Griffin v. Camp*, 40 F. 3d 170, 174 (7th Cir. 1994).

On remand, the magistrate judge this time granted the petition for a writ of habeas corpus. Finding that Griffin had "a viable alternate defense available," the magistrate judge concluded that only Jimmy Smith would have benefitted from an alibi defense, and "[o]nly by presenting the alibi defense could counsel have represented both clients." (App. 41). The judge concluded that the existence of an innocent bystander defense for Griffin made his position antagonistic to Jimmy Smith's and, consequently, found that a conflict of interest existed between Griffin and Smith. (App. 41-42).

B. The Proceedings Below

In its May 21, 1996, opinion affirming the grant of habeas relief, the majority of the three-judge panel below relied on three Seventh Circuit cases: *United States ex rel. Cole v. Lane*, 752 F.2d 1210 (7th Cir. 1985), *United States v. Cirrincione*, 780 F. 2d 620 (7th Cir. 1985), and *Gray v. Director, Department of Corrections*, 721 F.2d 586

(7th Cir. 1983). After correctly citing the standards set forth in *Cole*, *Gray*, and *Cirrincione*, the majority appeared to combine the standards from those three cases in fashioning is own rule for this particular case, *Teague*[1] considerations notwithstanding. More specifically, the majority effectively concluded that although a defendant, whose co-defendant is represented by the same attorney, fails to tell the attorney about the possible availability of an "unpromising" defense which could compromise the co-defendant's interest, but rather tells the attorney only about a "hopeless" defense he wishes to share with his co-defendant, with the information counsel receives from collateral sources concerning the possible availability of the "unpromising" defense, counsel is under a duty not only to discuss with the defendant "the disadvantages of linking his fortunes" to those of his co-defendant, but to perhaps outright refuse to present the "hopeless" defense on the defendant's behalf. In the dissent, on the other hand, Judge Flaum concluded that under not only Seventh Circuit case law, but more importantly, this Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the defendant must establish more than merely a potential conflict of interest, and that, Griffin did not do.

On May 29, 1996, Griffin filed a motion for bond pending the court of appeals' issuance of the mandate and, on June 4, 1996, the Petitioner filed a petition for rehearing with suggestion for rehearing *en banc*. On July 19, 1996, the court of appeals issued an order deferring its ruling on Griffin's bond motion pending a merits decision in *Lindh v. Murphy*, a §2254 case arising out of Wisconsin,

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[1] *Teague v. Lane*, 489 U.S. 288 (1989).

reargued *en banc* on June 17, 1996, which raised issues concerning the construction of the new Antiterrorism and Effective Death Penalty Act of 1996.

On September 12, 1996, the court of appeals issued its merits decision in *Lindh v. Murphy*, 96 F. 3d 856 (7th Cir. 1996 (*en banc*). In *Lindh*, the court held, among other things, that §2254(d), as amended by the Antiterrorism Act, applies to cases that were pending on the date of enactment and bars relief on constitutional claims adjudicated in state court, unless the prisoner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion. 96 F. 3d at 867, 869, 876.

On September 23, 1996, only 11 days after *Lindh* was decided, Petitioner filed a letter pursuant to Circuit Rule 28(j), citing as additional authority the court of appeals' decision in *Lindh*. Entered on the same day was an order from the court denying Petitioner's petition for rehearing with suggestion for rehearing *en banc*. The order further stated that the court's May 21 opinion had been amended by inserting the following as footnote 11:

> The State has not argued in its petition for rehearing that this case is affected by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (Antiterrorism Act), which amends the procedures and standards applicable to petitions for writs of habeas corpus. In *Lindh v. Murphy*, No. 95-3608, issued September 12, 1996, this court en banc considered and decided a number of issues involving the application of the Antiterrorism Act. Among other things, we decided that a state may waive the benefits of the amended 28 U.S.C. § 2254(d) (slip op. at

> 13). That being the case here, we need not further consider the application of the Antiterrorism Act.

(App. 30).

On September 25, 1996, when Petitioner discovered that the court of appeals had issued an order finding that the State had waived the benefits of § 2254(d), it filed a motion to vacate that portion of the court's order. On October 3, 1996, the court of appeals denied Petitioner's motion, with Judge Flaum dissenting.

On October 4, 1996, Petitioner filed an emergency motion with the court of appeals asking it to recall the mandate, which had issued on September 27, 1996, in order that a petition for writ of certiorari could be filed with this Court. On October 7, 1996, the court of appeals denied the motion, again with Judge Flaum dissenting. At that point, Petitioner filed with Justice Stevens an emergency application to recall the court of appeals' mandate pending the filing of a petition for certiorari. Justice Stevens denied the application, and Petitioner refiled the same, this time addressing it to the Chief Justice. This Court entered an order on October 15, 1996, denying Petitioner's application, No. 254.

On October 8, 1996, the district court released Griffin on unsecured bond. He remains free today. The State has until January 18, 1997, to decide whether to retry him.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' FINDING THAT THE STATE WAIVED THE BENEFITS OF AMENDED 28 U.S.C. §2254(d) IS NOT CONSISTENT WITH THIS COURT'S DECISIONS IN *SUMNER v. MATA* AND *LOUISVILLE & NASHVILLE R. CO. v. MOTTLEY*

A. If the Court of Appeals Was Correct With Respect To Its Holdings in Connection With Amended §2254(d) in *Lindh v. Murphy*, Then the Court Erred in Not Applying the Provision To the Case at Bar.

If this Court finds that the court of appeals was in fact correct in *Lindh*, where it held that amended §2254(d) applies to cases that were pending on the date of enactment and bars relief on constitutional claims adjudicated in state court unless the prisoner can "point to an authoritative decision of the Supreme Court," to which the state court's decision is contrary or which the state court applied in an unreasonable fashion, then this Court must find that the court reached an incorrect decision when it refused to apply amended §2254(d) in the case at bar when it concluded that the State waived the benefits of the provision by not specifically directing the court's attention to the new Act.

In holding in this case that the State could waive the benefits of §2254(d), the court of appeals relied on a portion of its decision in *Lindh*. There the court stated:

> We do not suggest that §2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. §2241; a state may waive the benefits of 28 U.S.C. §2254(d), although other provisions of the 1996 Act, such as the revised

> exhaustion requirement in §2254(b), suggest that counsel's inattention to niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. *See also Eaglin v. Welborn*, 57 F. 3d 496, 498-99 (7th Cir. 1995) (*en banc*) (holding that a court may decide a case on the basis of *Teague* even if the state's lawyers overlooked that possibility).

96 F. 3d at 865. *See also Watkins v. Meloy*, 95 F. 3d 4, 5-6 (7th Cir. 1996) and *Emerson v. Gramley*, 91 F. 3d 898, 899-900 (7th Cir. 1996) (both holding that the provisions of the new Act governing the scope of federal judicial review do not affect the subject-matter jurisdiction of the federal courts, and thus can be waived).

Petitioner respectfully submits that the court of appeals, in holding as it did, ignored this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), in which the Court reaffirmed its 1908 decision in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). In *Sumner*, then-Justice Rehnquist wrote:

> The dissent contends that any argument premised on § 2254(d) was 'abandoned' because petitioner raised his § 2254(d) argument before the District Court, but did not do so in his appellate brief. (citation omitted). Presumably, this contention does not mean to imply that petitioner conceded error with regard to the state-court factual determinations, but instead that he 'abandoned' his right to rely on § 2254(d) as a reason for *not* rejecting these factual determinations. (Emphasis in original). Whether or not the petitioner specifically directed the Court of Appeals' attention to § 2254(d) makes no difference as to the outcome of this case. The present codification of the federal habeas statute is the successor to 'the first congressional grant of jurisdiction to the federal court,' *Preiser v. Rodriguez*, 411 U.S. 475, 485, 93 D.Ct.

> 1827, 1833, 36 L.Ed.2d 439 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of that jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S.Ct. 42, 43 53 L.Ed. 2d 126 (1908), and have repeatedly since reaffirmed, "it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court], which is defined and limited by statute, is not exceeded." Having had the benefit of the full briefing and argument from the parties on the § 2254(d) issue, we are simply following the well-established doctrine of the *Mottley* case in deciding the § 2254(d) issue.

449 U.S. at 547 n. 2. *See also Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 n. 4 (1986).

Given this Court's finding in *Sumner*, the court of appeals was incorrect in holding that amended §2254(d) does not affect a federal court's subject-matter jurisdiction and can, therefore, be waived. Because the court decided an important question of federal law in a way that conflicts with relevant decisions of this Court, this Court should grant the petition for writ of certiorari.

B. Had the Court of Appeals Not Held that the State Waived the Benefits of Amended §2254(d) and Applied the Provision in this Case, the Result of its Opinion on the Merits Would Have Been Different.

Had the court of appeals not found that the State waived the benefits of amended §2254(d), but instead rightfully applied it in this case, pursuant to its own reasoning in *Lindh*, the result of Griffin's appeal would necessarily have been different. As the court of appeals held in *Lindh*, the prisoner "must be able to point to an authoritative decision of the Supreme Court in order to

secure a writ." 96 F. 3d at 869. The majority in the case at bar, however, relied instead on Seventh Circuit case law—*Cole*, *Gray*, and *Cirrincione*—in fashioning its own rule to justify granting the writ, while in the dissent, Judge Flaum correctly stated that under *Cuyler*, which requires more than the showing of a potential conflict of interest, Griffin could not win.

Using the court of appeals' own words from *Lindh*, 96 F. 3d at 876 (emphasis in original), the Illinois Supreme Court in this case determined "the *legally* correct question" under *Cuyler*, *i.e.*, whether evidence of an actual conflict was shown." *Griffin*, 109 Ill. 2d at 303, 487 N.E. 2d at 603.

Moreover, in applying that standard to the facts of the case, the Illinois court rendered a "responsible, thoughtful answer." *See Lindh*, 96 F. 3d at 871. The state high court found that no actual conflict was apparent from the record because Griffin testified to a common alibi for himself and Smith, and it refused to credit Griffin's assertion that he had told his trial counsel the "present but innocent" story, finding it more likely that when Griffin fired his first lawyer who was attempting to negotiate a deal on the basis of the "innocent bystander" theory, he simply abandoned that theory in favor of the alibi defense. 109 Ill. 2d at 303, 304, 487 N.E.2d at 603. The court also found that even if counsel had been made aware of the "innocent bystander" theory through collateral sources obtained during discovery, it could not be said that such information clearly placed Griffin and Smith in antagonistic positions for trial because the statements Griffin made to police during the investigation stage were ambiguous, not clear statements that he had not participated in the shootings or that Smith was

solely responsible for them. 109 Ill. 2d at 304-05, 487 N.E.2d 603-04. Finally, the state court found that the discrepancies between the testimony of two trial witnesses regarding the timing of Griffin's arrival at the crime scene, which Griffin claimed were not explored fully to his advantage, were attributable not to the fact that counsel was trying to help Smith at Griffin's expense, but perhaps because counsel was surprised by the witnesses' testimony since neither had testified before the grand jury, and also because counsel may have been "somewhat deflected" by the fact that Griffin was testifying that he and Smith were at a tavern at the time of the shootings and, consequently, felt that discrepancies as to what occurred at the crime scene were "irrelevant so far as that [the alibi] defense was concerned." 109 Ill. 2d at 306, 487 N.E.2d at 604. *See Burger v. Kemp*, 483 U.S. 776, 784-85 (1987) (finding that determining that there was an actual conflict of interest requires attributing counsel's motivation for a certain course of action to his or her divided loyalties).

To be sure, an actual conflict of interest, as opposed to merely a potential conflict of interest, is not easily discernable. However, as the court of appeals itself stated in *Lindh*, a "thoughtfully reasoned," "fact-specific" answer, such as the one the Illinois court rendered in this case, cannot be called unreasonable even if the federal court considers it to be "wrong." 96 F. 3d at 876-77. Accordingly, the court of appeals, had it properly applied §2254(d), should have deferred to the Illinois court's conclusion that, under the facts of this case, Griffin was not entitled to relief under the Sixth Amendment.

CONCLUSION

For the reasons set out above, the Court should grant a writ of certiorari to review the decision of the United States Court of Appeals.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

ARLEEN C. ANDERSON
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2235

Counsel for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2330

LEE O. GRIFFIN,

Petitioner-Appellee,

v.

RICHARD D. MCVICAR, Warden,
Shawnee Correctional Center,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 91 C 228—**Gerald B. Cohn**, *Magistrate Judge.*

ARGUED JANUARY 12, 1996—DECIDED MAY 21, 1996

Before POSNER, *Chief Judge*, and CUDAHY and FLAUM, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Respondent, Warden McVicar, appeals the grant of petitioner Lee Griffin's habeas corpus petition. The district court granted the writ of habeas corpus on grounds of ineffective assistance of counsel due to an actual conflict of interest inhering in the joint representation of Griffin and a co-defendant, Jimmy Lee Smith, by Marvin Goldenhersh in a 1981 murder trial. We affirm.

I. Introduction

Lee Griffin and Jimmy Lee Smith were convicted in June 1981 of the shooting murder of Charles Sims, Christi Smith and Ronald Walker and of the serious wounding of Charles Kellick. The shootings occurred on February 5, 1981, in the apartment which Smith and Walker shared. Three men were identified by witnesses as having been involved in the shootings—Lee Griffin, Jimmy Lee Smith and Will Hudson, who apparently was never apprehended. Griffin was initially represented by attorney Ralph Derango. He told Derango that, though he had walked in during the shooting episode, he had not been involved in the shootings but was merely an innocent bystander who had, in fact, tried to stop the shooting. On this basis, Derango approached police officer L. C. Moore and attempted to negotiate a deal for Griffin in exchange for his testimony against Smith. Derango's overtures were apparently not well-received by the State and, perhaps for that reason, Griffin's family retained Marvin Goldenhersh in Derango's place approximately three weeks after Griffin's arrest. The state court opinions in this case indicate that Mr. Goldenhersh was already representing Jimmy Smith at that time.[1] *People v. Griffin*, 463 N.E.2d 1063, 1065 (Ill. App. 5 Dist. 1984); *People v. Griffin*, 487 N.E.2d 599, 602 (Ill. 1985).

Mr. Goldenhersh moved to sever the trials of the two defendants on grounds that Jimmy Smith's extensive criminal record might prejudice Griffin and that either defendant might have made admissions which could prove dam-

[1] Mr. Goldenhersh disputes this fact in his deposition, taken in connection with this habeas petition. There he claims that he undertook representation of Griffin prior to taking on the representation of Jimmy Smith. Since no one suggests that Mr. Goldenhersh *intentionally* gave preference to the representation of Smith over the representation of Griffin, the order in which he took on their cases is not of any material significance to the resolution of this appeal.

aging to the other.[2] In arguing the motion Mr. Goldenhersh specifically cited examples of admissions made by Griffin. The motion to sever was denied.

The potential for conflict of interest in the joint representation of Griffin and Jimmy Smith was raised at least twice prior to trial, although not by Mr. Goldenhersh. When questioned by the judge prior to trial, Mr. Goldenhersh asserted that there was no conflict in his joint representation. Then, during the hearing of motions just prior to trial, the State, apparently concerned about the potential for reversal on appeal, raised the issue of potential conflicts:

> Mr. Hamilton [State's Attorney]: The second question which I think we should deal with is whether these defenses, these defendants' defenses will become, if they are not now, antagonistic to each other at some point in the trial. Now Mr. Goldenhersh has represented both of these defendants for some time. He has access to the Discovery provided by the State's Attorney's Office. He has talked with both of these defendants, and I don't think he should be permitted to just juggle strategic weapons, if [sic] I'm not trying to suggest that there is anything improper into his continued representation of both defendants, but if he now knows that such a conflict may develop, perhaps there is a question of whether he can continue to represent both the parties. . . .

Trial Tr. at 12.

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[2] Mr. Goldenhersh recalls in his deposition that the primary grounds for the motion to sever was the potential prejudice to Griffin from Smith's criminal record and that "anything else that [he] threw into the motion would have been incidental." Resp. App. Exh. F at 32. This recollection is contradicted by the severance hearing transcript which shows that the possibility of damaging admissions was a substantial basis for the motion. Pet. App. Exh. E. Indeed, the discussion during that hearing focused almost entirely on potential prejudice due to damaging admissions.

Neither Mr. Goldenhersh nor the trial judge responded to this point and the case proceeded to trial without further inquiry into the matter.

II. The Trial

A. The Evidence

The eyewitness testimony, taken as a whole, established that three men, other than the victims, were in the apartment during the period in which the shootings occurred. Christi Smith was already in the apartment with one of these men when Sims and Kellick, who had come by to visit Christi and were outside the apartment, heard her crying. When she did not answer the door, they went in to investigate. Velma Robinson, who had come with Sims and Kellick, remained outside in Kellick's truck while they went in. Velma saw two more men get out of a red and white Cadillac and enter the apartment after Sims and Kellick had gone in.

When Sims and Kellick entered the apartment looking for her, Christi Smith was in the bathroom with one of the other three men. The two men whom Robinson had seen enter came up behind Sims and Kellick. At this point, Sims was shot by the man in the bathroom, according to Kellick. Kellick turned to run and he was shot twice—once in the back of the head and once in the face after he fell. At some point after the three men left, Kellick managed to crawl out of the apartment and hide in a basement or crawl space under the stairs.

Next, Robinson saw the same two men she had observed entering leave the apartment and drive away. A few minutes later Walker returned home and went into the building. Shortly after that, the two men in the Cadillac returned, got out of the car and went into the building as well. Robinson heard another shot, at which time she drove away in search of police. Though Walker was shot five times, he managed to make his way to a nearby convenience store where he spoke to several police officers. He

died shortly thereafter, having been taken by ambulance to a hospital.

The key issues at trial were the identification of the three men and of the role each had played. Smith was identified as a shooter by the testimony of Kellick and of three witnesses who testified as to the dying declarations of Walker. Kellick testified that Jimmy Smith shot him in the face and kicked him after he was felled by a shot from behind as he tried to run away. Three witnesses testified to having heard Walker's dying declarations in the convenience store. Police officer Settles, state trooper Rice and store manager David Winchester each testified that he heard Walker say that Jimmy Smith shot his girlfriend (Christi Smith).

While this testimony consistently implicated Smith, there were significant contradictions in the testimony implicating Griffin in the shootings. Kellick testified that Griffin was the first man in the apartment and was in the bathroom with Christi Smith when Kellick arrived. Thus, Kellick testified, it was Griffin who shot Sims. Kellick did not identify Griffin immediately, however. He was hospitalized after the shootings due to his serious injuries. A police officer testified that at the hospital in the hours just after the shootings Kellick told him that he didn't know who had done the shooting. Tr. at 337. Kellick testified that he did not remember talking to police during the first few days after the incident. Kellick later identified Griffin from a videotaped lineup several days after the shooting. He testified that he recognized Griffin from having seen him on two prior occasions.

Robinson, in direct contradiction of Kellick's testimony, identified Griffin as one of the two men who emerged from the red and white Cadillac (later shown to be Griffin's) and entered the apartment *after* Sims and Kellick.

Police officer Settles testified that Walker said that "Lee" shot him. State trooper Darrell Rice, however, testified that Walker said that *Lee's friend* shot him. Winchester had not heard Walker say who had shot him.

In sum, while Kellick's unrefuted testimony identified Jimmy Smith as his assailant and all three witnesses to Walker's dying declaration reported his identifying Jimmy Smith as Christi Smith's assailant, only two witnesses, Kellick and Settles, gave testimony suggesting that Griffin had shot anyone. The testimony of each of these latter two witnesses was directly contradicted by other testimony. Thus, the identification evidence against Jimmy Smith was much stronger than the evidence against Griffin.

B. The Theory of Defense

At trial, Griffin and Smith were both represented by Mr. Goldenhersh. The two defendants presented a joint alibi defense, consisting of Griffin's testimony that he and Smith had been at a local tavern playing cards at the time of the murders. The alibi was supported to some extent by the testimony of a witness, Priscilla Smith,[3] that she had loaned Griffin five dollars and danced with him at the tavern. Priscilla Smith placed the defendants at the tavern between 4:30 and 5:00 p.m. and again at sometime after 6 p.m. and said that she did not see them there after about 6:30 p.m. The shootings apparently took place sometime between 5 p.m. and 6:30 p.m., when Walker showed up at the convenience store.

The alibi story was presented through Griffin's and Priscilla Smith's testimony. However, Mr. Goldenhersh's major trial strategy was apparently to discredit the eyewitness identifications of Griffin and Jimmy Smith. Indeed, Mr. Goldenhersh did not even mention the alibi in either his opening or closing argument. Mr. Goldenhersh's efforts to discredit the eyewitness testimony were organized around a theory that the shootings were linked to the drug-related killing of Griffin's brother, which had oc-

[3] As far as we can ascertain from the record, Jimmy Smith, Christi Smith, Priscilla Smith and another witness, Betty Smith, are not related to one another.

curred just a few weeks earlier.[4] In his opening statement, for example, Mr. Goldenhersh said that the evidence would show that Sims and Kellick "after killing the brother of Griffin, . . . then have set up and plotted, plainly set up and plotted to make his brother, Lee Griffin, and Jimmy Smith the scapegoats of this dope-related killing." Tr. at 159. To this end, Mr. Goldenhersh repeatedly tried to elicit detailed testimony about the drug involvement of the victims and to connect them to Griffin's dead brother. The State resisted these attempts, stating in a portion of the proceedings held away from the presence of the jury that "[a]t best, all that Mr. Goldenhersh's offer of proof does is provide speculation as to motive, and provide a motive for particularly defendant Griffin to have committed the offenses named in the indictment." Tr. at 454. The trial court sustained the State's objections to questioning along these lines, finding such questions irrelevant to the identification issues at hand. Mr. Goldenhersh, however, continued to pursue the scapegoat theory in his closing arguments, pointing out the time which passed after the shootings before either Kellick or Robinson identified the defendants and arguing that Kellick and Robinson were participating in a "cover-up." Mr. Goldenhersh discussed at length the fact that Sims had one thousand dollars with him when he went to Christi Smith's house and insinuated that the police investigation was not thorough and that "there couldn't be all this dope and one thing and another without some police involvement." Tr. at 499.

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[4] Any connection between Griffin's brother and Sims was evidenced only by Moore's hearsay grand jury testimony that he had received an anonymous phone call connecting the two. The story was presented to the grand jury to suggest that Sims was at least indirectly responsible for the death of Griffin's brother, thereby providing a motive for Griffin to shoot Sims. The prosecution apparently abandoned this theory and the speculation about a connection between the killings came in at trial only through Mr. Goldenhersh's opening, Tr. at 158-59, and closing, Tr. at 498, arguments and his attempts to question Officer Moore about a possible connection. Tr. at 348-49.

III. History of the Ineffective Assistance Claim

A. State Court History

Griffin has pursued the ineffective assistance claim which is the subject of this appeal through numerous state court proceedings. Griffin first presented the claim in his direct appeal of his conviction. In that appeal, Griffin relied on Mr. Goldenhersh's failure to present a non-participating bystander defense as grounds for the ineffective assistance claim. Griffin Direct App. Br. He noted that Mr. Goldenhersh was aware that Griffin had made statements to the police indicating that he had been present at the scene and knew who had done the shooting, but that Mr. Goldenhersh, in spite of this, still did not pursue an innocent-bystander defense.

In addition, Griffin argued that the joint representation left Mr. Goldenhersh completely unable, without compromising his representation of Smith, to impress upon the jury that the eyewitness testimony was much less conclusive with respect to Griffin than it was with respect to Smith. Instead, Mr. Goldenhersh was forced to attempt to discredit completely the testimony of these witnesses, including testimony, such as that of Trooper Rice. Rice reported Walker as saying that it was "Lee's friend" who shot him. Of the same ilk was the testimony of Robinson that Griffin was not in the apartment when Kellick and Sims entered. This evidence would have tended to exonerate Griffin at Smith's expense.

Griffin pointed out on direct appeal that Mr. Goldenhersh not only failed to pursue lines of inquiry which would have aided him at Smith's expense, but actively pursued a defense strategy which was highly prejudicial to Griffin alone. By presenting the scapegoat theory, Griffin argued, Mr. Goldenhersh "succeed[ed] in [his] opening statement in giving the jury a motive for Griffin to kill the victims that the State would not have been able to elicit . . . [and in] taking a defendant with no record and involving him by implication in dope traffic and a 'dope-involved killing'." Griffin Direct Appeal Br. at 13.

Finally, Griffin pointed out various other shortcomings in Mr. Goldenhersh's representation, such as his attack on the morals of the victims on grounds of "drugs and inter-racial sex"; his suggestion that Kellick was involved in a cover-up when after being shot in the head he took three days to identify the perpetrators; Mr. Goldenhersh's complete failure to present any evidence in support of his scapegoat theory; and his failure to object to various bits of damaging argument such as the State's Attorney's assertion that Walker identified Lee Griffin as his killer.

The Illinois Appellate Court, on May 14, 1984, ruled that the proposed alternative bystander defense was "too speculative to constitute the actual conflict required . . ." for ineffective assistance. The court noted that there was "nothing in the record to indicate that defendant Griffin presented his attorney with any facts other than those supportive of the alibi defense." Finally, the court stated that "[t]he failure of counsel to adopt a defense inconsistent with his client's testimony cannot reasonably be characterized as incompetent." *Griffin*, 463 N.E.2d at 1062.

While waiting for his appeal to be resolved, Griffin filed a state post-conviction petition. That petition was heard on October 12, 1982. In the hearing on that petition, Griffin testified that he had told both Derango and Mr. Goldenhersh that he had been present at the time of the attacks but that he had not shot anyone nor condoned the shooting. He stated that Mr. Goldenhersh had told him that if he said he was present he would be found guilty on an accountability theory. Griffin testified that he had lied at his trial when he stated that he and Smith were playing cards at the tavern while the shootings took place. He explained that he had lied because he believed that if he put himself at the scene of the crime he would be held accountable. Griffin also testified that Mr. Goldenhersh never talked to him about having his case tried separately from Smith's and that he and Smith and Mr. Goldenhersh had agreed that, because of Smith's prior record, Griffin would have to be the one to take the stand and testify to the alibi.

In the post-conviction proceeding, Griffin's attorney argued that the joint representation presented a conflict, for some of the same reasons argued on direct appeal, and that it constituted ineffective assistance of counsel. The trial judge denied the post-conviction petition, saying:

> The Court is very familiar with the case, and of course what the defendant is asking me to do is disregard his prior perjured testimony and to say now that he has seen the light, and he's in to tell the truth. I don't know whether he's telling the truth or not. I don't know whether he told his attorney Mr. Goldenhersh that or not. He was afforded a defense according to the defendant's own testimony on the stand under oath. There was no conflict in the defense between the defendant and his co-defendant. Motion will be denied.

Resp. App. Exh. C at 21-22.

Griffin's appeal of the denial of his post-conviction petition was decided by the Illinois Appellate Court on the same day as was his direct appeal. That court reversed the trial court and granted Griffin's post-conviction petition on grounds of ineffective assistance of counsel. *People v. Griffin*, 463 N.E.2d 1063 (Ill. App. 5 Dist. 1984). The court relied on the principle that "in some instances, however, the choice of treating co-defendants differently is more than a mere possibility; it is forced on counsel by the difference in evidence offered against co-defendants." *Id.* at 1071. The court pointed out that:

> In order to take full advantage of the inconsistencies in the identification of Griffin, Goldenhersh would have had to distinguish between the uncontradicted assertions that Smith killed the girl and shot Kellick and the uncertainties about the identity of the man in the bathroom who shot Sims and the man or men who shot Walker. As it was, he only pointed to the inconsistencies and ambiguities as matters going to the credibility of the State's witnesses. Counsel could not give Griffin the best possible defense under the

> circumstances because to do so would have been disloyal to Smith, his original client. Because of this conflict of loyalties, he remained silent when independent counsel would have spoken out on Griffin's behalf.

Id. at 1072. For these reasons the Appellate Court granted Griffin's petition.

On the State's appeal to the Illinois Supreme Court, however, the decision of the Appellate Court was reversed. *People v. Griffin*, 487 N.E.2d 599 (Ill. 1985). The Illinois Supreme Court emphasized that the Appellate Court was not in a position to judge the credibility of Griffin's testimony regarding what he had told Mr. Goldenhersh about whether he was present at the scene of the shooting. The Illinois Supreme Court also was unconvinced that Mr. Goldenhersh's failure to closely explore the discrepancies in the identification testimony of the various state witnesses was ineffective assistance. The Court said that "[b]ased on these discrepancies, trial counsel did attack the credibility of the witnesses. His attack, however, was probably somewhat deflected by the fact that the defendant was testifying to the joint alibi that he and Smith were at the tavern. . . . It would seem incongruous to permit a defendant to perjure himself and then benefit from that perjury by successfully contending that his attorney, because of the perjury, did not most effectively explore grounds for his advantage." *Id.* at 604.

B. Federal Habeas Corpus Proceedings

Griffin's federal petition for writ of habeas corpus continued to argue that he received ineffective assistance of counsel from Mr. Goldenhersh due to the joint representation. Mr. Goldenhersh was deposed in connection with the habeas corpus proceedings. The magistrate judge found that "[i]n his deposition, Marvin Goldenhersh stated that only facts relating to the alibi defense were given to him while preparing for trial." He also found that "Mr. Goldenhersh further stated that he never discussed the theory

of accountability with the petitioner and did not tell him that he would be found guilty if he admitted being at the scene." On this basis, the district court denied the habeas corpus petition. Resp. App. Exh. A at 11.

On appeal, however, this court noted apparent inconsistencies between the district court's factual findings and the record. In particular, we pointed out that Mr. Goldenhersh testified in his deposition that he did discuss accountability with Griffin and that he stated that "there was the possibility that [Griffin] could be found guilty on the basis of accountability." *Griffin v. Camp*, 40 F.3d 170, 174 (7th Cir. 1994). We also noted that "[a]lthough Goldenhersh unequivocally stated that Griffin only gave him one version of the events—the version supporting the alibi defense—Goldenhersh's other statements indicate that he had access to a significant amount of evidence which pointed to another potential defense." *Id.*

Finally, we pointed out that the district court neglected to explain "how the law, when applied to these facts, led to the conclusion that Griffin had effective assistance of counsel." *Id.* We thus remanded the case to the district court for clarification.

On remand, the district court reviewed the record and found that an actual conflict of interest existed. The district court relied on two grounds for this conclusion. First, the court acknowledged that Mr. Goldenhersh testified in his deposition that Griffin never told him facts which were at odds with the alibi defense. However, the court noted that the record shows that Mr. Goldenhersh was aware before trial of facts suggesting the availability of a viable innocent bystander defense. The district court also stated that "only Jimmy Smith would have benefited from an alibi defense," noting that "Jimmy Smith, as a convicted felon was unable to testify" so that "[i]n a joint trial, only [Griffin] was able to take the stand in their behalf." Finally, the court pointed out that the alibi defense provided the only way in which Mr. Goldenhersh could have represented both clients. Dist. Ct. Order at 12-14.

Based on these considerations, the district court found that a conflict of interest existed between Griffin and Smith such that joint representation of the two was precluded. The court also recognized that the record clearly showed that Griffin had never waived any conflict of interest between Smith and him with respect to their respective defenses. The district court thus granted Griffin's petition for a writ of habeas corpus.

IV. Analysis

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Supreme Court set out the standard for a finding of ineffective assistance of counsel based on multiple representation. There, the Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348. A mere possibility of a conflict is not sufficient to violate the Sixth Amendment. However, once a defendant has shown that an actual conflict exists, no showing of prejudice is required. *Id.* at 348-50. In general, trial courts are not required to inquire into the possibility of a conflict and "may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." *Id.* at 347.[5]

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[5] It is worth pointing out, however, that if the trial court "knows or reasonably should know that a particular conflict exists" the court is required to initiate an inquiry. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980). The Federal Rules of Criminal Procedure, in fact, require that whenever there is joint representation "the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation." Fed. R. Crim. P., Rule 44(c). In the current case the prosecution brought the potential for conflict of interest to the attention of the trial court. There is perhaps a question whether at that point the trial court was obligated to inquire further into the matter. Since the Petitioner does not raise this question, however, we pursue it no further.

The determination whether a particular case presents an actual, as opposed to a potential, conflict of interest is not always straightforward. The mere presentation of a "common defense" does not conclusively demonstrate that any conflict of interest was merely potential. "A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." *United States ex rel. Gray v. Director, Dept. of Corrections*, 721 F.2d 586, 596-97 (7th Cir. 1983), quoting *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975). Conversely, the mere fact that co-defendants abandon a pre-trial stance in which they accuse each other of a crime in favor of a common defense does not lead ineluctably to the conclusion that their attorney faced an actual conflict of interest. *United States v. Cirrincione*, 780 F.2d 620, 629-31 (7th Cir. 1985). When a defendant makes a purely tactical decision to abandon a defense which is adverse to that of a co-defendant, he or she cannot then claim to have been a victim of ineffective assistance of counsel. *United States ex rel. Cole v. Lane*, 752 F.2d 1210, 1220 (7th Cir. 1985).

Thus, in circumstances such as the present case, where a defendant has pursued a common defense rather than an alternative defense adverse to the interests of a co-defendant, a showing of ineffective assistance of counsel requires that the complaining defendant show "specific instances where [his] attorney could have, and would have, done something different if that attorney had represented only one defendant." *Cirrincione*, 780 F.2d at 630-31. However, these specific instances need not be taken solely from the conduct of the trial. Instances in which choices of strategy would have been made differently had there been separate representation may also demonstrate ineffective assistance of counsel. "The test for conflict between defendants is not whether the defenses actually chosen by them are consistent but whether in making the choice of defenses the interests of the defendants were in conflict." *Gray*, 721 F.2d at 597.

Applying these standards to the present case, we find that the district court was correct in ruling that an actual conflict of interest existed in the joint representation of Griffin and Smith.

Mr. Goldenhersh was possessed of information which would have suggested to an unconflicted counsel the availability of a defense focused on discrediting the identification of Griffin and shifting the blame onto Jimmy Smith. Whether or not Mr. Goldenhersh was actually told by Griffin that he had been present at the scene of the shooting,[6] Mr. Goldenhersh did know that Griffin had

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[6] The district court did not make a specific determination whether Mr. Goldenhersh was informed by Griffin that he had been at the scene of the crime. Such a determination is not necessary to our resolution of this case, for we assume for purposes of this discussion that, contrary to Griffin's testimony, Mr. Goldenhersh was not told by Griffin that he had been present at the time of the shootings. We note, however, that Mr. Goldenhersh's deposition testimony as to what Griffin told him in this regard is not entirely consistent. While Mr. Goldenhersh insists that Griffin never presented him with facts which conflicted with the alibi story, he also stated at one point that "my recollection of what Griffin told me about the occurrence was that he and Smith were there, but by the time they got there, that the shootings had already occurred." Resp. App. Exh. F at 15. Later in the deposition, Mr. Goldenhersh backed away from this statement, saying that he was not sure where he had gotten the idea that Smith and Griffin had been present at the scene of the shootings. Similarly, Mr. Goldenhersh, at one point, stated that his discussion of accountability with Griffin was prompted by Griffin's questions concerning the effect of the statements he had made to Derango. *Id.* at 21-22. When pressed, however, Mr. Goldenhersh couldn't say for sure "whether [Griffin] talked in terms of this is what he told Derango or whether he talked in terms if this were his testimony." *Id.*

In general, and understandably after a ten year lapse of time, Mr. Goldenhersh's deposition testimony indicated considerable confusion in his recollection of events. For example, he stated that the motion to sever was primarily based on concerns with Jimmy Smith's criminal record. In fact, the record of the severance hearing clearly indicates that Mr. Goldenhersh was at least equally concerned with the potential effects of Griffin's damaging admissions on Smith's case.

stated earlier to Derango and to Officer Moore that he had been there and could identify Smith as a shooter. Mr. Goldenhersh had also received discovery from the prosecution which included police reports indicating that Kellick had identified Griffin as the man who shot Sims and reports describing the conflicting versions of Walker's dying declaration. Prior to trial, Mr. Goldenhersh received a memorandum from the prosecution purporting to describe the revised testimony which Robinson intended to give. Trial Tr. at 107. In her testimony, Robinson identified Griffin as one of the two men who arrived at the scene in the Cadillac. Trial Tr. at 226. Given all of this available information, we cannot accept the conclusion that Mr. Goldenhersh was unaware of the difficulties with the alibi defense and the possibility of an innocent bystander defense.

The question, then, is what Mr. Goldenhersh was obligated to do with this information in order to provide effective assistance of counsel. Of course, the mere fact that a defendant chooses one of two available defenses cannot establish ineffective assistance of counsel, even if the defendant makes a bad choice. However, counsel may be ineffective if the joint representation precludes an obvious and viable alternative defense when the common defense is so completely untenable. Failure to consider the possible defenses with a mind to the best interests of a client is particularly likely when the alternative to a common defense is helpful to one client but is highly detrimental to the other (as was the case here).

Here, in spite of all the information suggesting the likely untruth of Griffin's alibi and the near certainty that it would not be believed by a jury, there is no suggestion in the record that Mr. Goldenhersh pressed Griffin as to the validity of the alibi, discussed with him the possibility of a bystander defense or pointed out the comparative weakness of the State's case against him as opposed to the case against Smith. Even if Griffin did represent that the alibi story was true, an effective attorney would have discussed with Griffin the disadvantages of linking his for-

tunes to those of Smith, given the strength of the eyewitness identifications of Smith and Smith's extensive criminal history.[7] An attorney free to consider Griffin's singular interests would, particularly in light of Griffin's waffling on his story, have pointed out the possibility of resting a defense on the weakness and contradictions in the testimony implicating him in the shootings. This approach would have compared favorably with bringing in an alibi which left Griffin with the task of refuting the evidence against Smith as well.

This case is thus distinguishable from *Cirrincione* and *Cole*. In *Cirrincione*, the defendant claimed that he refrained from testifying at his joint trial with his father because he feared that his testimony would hurt his father. The court, however, found that it was "not clear how [his] testimony . . . could have hurt [his father]" and that it was "highly unlikely that Tom refused to take the stand" to protect his father. Similarly, the court found little merit in the defendant's contention that he was damaged by his inability to cross-examine his father when there was "nothing in the record inculpatory of [the defendant] that was not already corroborated by other witnesses' testimony." *Cirrincione*, 780 F.2d at 631.

In *Cole*, the defendants never moved to sever the trial despite statements that each had given to police admitting that both were present at the scene of an armed robbery but accusing the other of having taken the money and carried the gun. At trial the defendants abandoned their mutual accusations and presented a common defense in which they attacked the credibility of prosecution witnesses and explained why they were in the area where the armed robbery occurred. *Cole*, 752 F.2d at 1220. The facts of *Cole* do not suggest that the decision to pursue a joint defense redounded to the detriment of one co-defen-

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[7] We note in this regard that the fact that a client tells an attorney he has an alibi does *not* require the attorney to present the alibi defense.

dant and to the advantage of the other. The two co-defendants were in apparently equivalent positions and seemingly made a joint decision to give up accusing each other and gain the advantages of a consistent defense. There is thus nothing about *Cole* which suggests that separate counsel would have done anything differently.[8]

The current case, however, is not one, like *Cirrincione*, in which co-defendants gambled on a common defense which was as likely to prove advantageous to one as to the other. Nor is it a case, like *Cole*, in which the avenues of inquiry closed off by the joint representation were of little consequence. In contrast to these cases, the record here suggests that both before and during the trial, Mr. Goldenhersh's choices were unacceptably constrained by the joint representation of Griffin and Smith and that these constraints worked to the unilateral disadvantage of Griffin.

The decision to present the alibi defense was, as the district court noted, clearly favorable for Smith's defense but likely detrimental for Griffin's. Without Griffin's alibi testimony, Smith did not have a leg to stand on in presenting a defense. He was unequivocally identified as having shot two of the victims and he had an extensive criminal record which effectively precluded him from testifying. Griffin, on the other hand, had the option of pursuing a defense based on the inconsistencies in the testimony iden-

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[8] *Cole* contains a statement that "in all of the cases where we have found an actual conflict of interest between codefendants who were jointly represented by the same defense counsel, the defendants did not abandon their defenses." *Cole*, 752 F.2d at 1220. This statement is incorrect, ignoring as it does the finding of actual conflict of interest in *Gray*, in which the defendant abandoned an adversarial defense in favor of a common defense with a co-defendant whom her attorney jointly represented. *Gray*, 721 F.2d at 597. In any event, the statement in *Cole* was merely one of statistics and not one of principle.

tifying him as a shooter.[9] These inconsistencies included: (i) the conflict between Kellick's testimony that Griffin was already in the apartment when he and Sims arrived and Robinson's testimony that Griffin was one of the two men who followed Kellick and Sims in; (ii) the conflict between Officer Settles' report that Walker's dying declaration was that "Lee" shot him and Trooper Rice's account that Walker said that "Lee's friend" shot him; and (iii) the implied conflict between Kellick's identification of Griffin as the one man already in the apartment and Walker's statement, attested to by all three witnesses, that Jimmy Smith killed his girlfriend, Christi Smith. (This last statement presents an implied conflict because Walker also said that Christi Smith was dead when he arrived at the apartment. Thus Walker's identification of Jimmy Smith as her killer was likely based on Jimmy's having been present when Walker arrived. Robinson, however, testified that Griffin and another man had left the apartment by the time Walker arrived and that they went back in only *after* Walker.)

In the face of the uncontradicted evidence placing Smith at the scene during the shootings, Griffin's testifying to an alibi which involved Smith could do nothing but damage his own case. While a defense based on simply raising doubts about the credibility of the testimony implicating Griffin in the shootings might well have been unsuccessful, the joint alibi defense was nearly as weak as no defense

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[9] The dissent contends that by emphasizing the strength of the case against Smith we "fail[ ] to concretely evaluate the relative strengths of the two potential defenses that were available to Griffin." Dissent at 25. There are two reasons for focusing on the strength of the case against Smith. First, as the dissent acknowledges, the presentation of the joint alibi defense inextricably bound Griffin's defense to that of Smith's. Griffin's alibi defense could be no stronger than Smith's. Second, the power of the case against Smith meant that the joint alibi was essentially the only defense available to Smith. This circumstance deepened the conflict inherent in the joint representation.

at all.[10] There was only the slimmest chance, if any, that a jury would believe the alibi in the face of the consistent eyewitness testimony placing Griffin and Smith at the scene of the murders. On the other hand, an attorney representing only Griffin could have impeached the identifications of Griffin as a shooter by exploiting obvious inconsistencies in testimony. The joint representation prevented Mr. Goldenhersh from exploiting the disparity in strength of the respective prosecution cases against Griffin and Smith.

It is true that the innocent bystander defense was not promising. It is often the unenviable job of defense counsel to choose among unpromising defenses. However, when an actual conflict of interest due to joint representation constrains an attorney to choose the hopeless in favor of the unpromising, the defendant has received ineffective assistance of counsel.

The disadvantage to Griffin which the joint alibi defense unavoidably imposed was exacerbated by Mr. Goldenhersh's conduct of the trial. The extent to which the scapegoat argument relating to Griffin's brother's killing could have been helpful even to Smith is highly questionable. In any event, it is most unlikely that any attorney representing only Griffin would have pursued such an unpromising tack. An unconflicted attorney would not have had to resort to the suggestion that the victims implicated Griffin in order to frame him because they were responsible for his brother's death a few weeks earlier. Such a flimsy theory may have been the only thing available to Smith given the consistent testimony identifying him as a shooter, but no effective attorney representing Griffin alone would have resorted to it.

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[10] The dissent agrees "that the evidence at trial did not conclusively demonstrate that Griffin was a shooter." What the dissent neglects to note is that the evidence at trial *did* conclusively demonstrate, to all intents and purposes, that Griffin and Smith were at the scene at the time of the shootings.

Finally, Mr. Goldenhersh was apparently so confused by his joint representation of the two defendants that he argued in closing that Walker, in his dying declaration, "told them . . . that Lee Griffin shot my girl friend." Trial Tr. at 488. In fact, the three witnesses to Walker's dying declaration unanimously reported that Walker said that it was *Smith* who shot his girlfriend, even though they differed as to what Walker said about his own attacker. Mr. Goldenhersh's statement was not a mere slip of the tongue. Mr. Goldenhersh argued that Walker's identification was unreliable by suggesting that he could not have known who shot his girlfriend since she was already dead when he arrived. In pursuing this effort, Mr. Goldenhersh suggested that "it could be argued that because Lee Griffin allegedly then shot him, that he jumped to the conclusion that he also shot his girl friend." *Id.* Thus, Mr. Goldenhersh not only told the jury incorrectly that Griffin was accused of shooting Christi Smith. But he also accepted as a premise for his argument that Walker had said that Griffin had shot him. In fact, of course, the witnesses to the declaration disagreed as to whether Walker implicated Griffin or "Lee's friend." Such a prejudicial confusion of the evidence would not have occurred if Griffin had had his own representation.

In conclusion, the record in this case undoubtedly provides "specific instances where [Griffin's attorney] could have, and would have, done something different if that attorney had represented only one defendant." *Cirrincione*, 780 F.2d at 630-31. The record therefore supports the district court's conclusion that an actual conflict of interest infected the joint representation of Griffin and Jimmy Smith. Lastly, the district court found, and we agree, that the record discloses no waiver of this conflict on Griffin's part. In fact, Mr. Goldenhersh never discussed the potential for conflict of interest with Griffin. Such an unwaived actual conflict of interest is a violation of the Sixth Amendment and requires the granting of Griffin's Petition for Writ of Habeas Corpus.

Therefore, we affirm the judgment of the district court. The writ shall issue, thereby releasing Griffin from custody, unless the State of Illinois elects to retry him within one hundred twenty (120) days from the issuance of this Court's final mandate.

AFFIRMED.

FLAUM, *Circuit Judge*, dissenting. The Supreme Court has held that in order to establish ineffective assistance of counsel based on multiple representation, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). It is not enough for the defendant to prove the existence of a possible or potential conflict of interest. *Id.* This court has held that where a defendant pursues a common defense rather than one adverse to his co-defendant, the defendant, to establish more than merely a potential conflict, "must show specific instances where [his] attorney could have, and *would have*, done something different if that attorney had represented only [the] defendant." *United States v. Cirrincione*, 780 F.2d 620, 630-31 (7th Cir. 1985) (emphasis added). The majority applies these standards and decides that attorney Marvin Goldenhersh's representation of Lee Griffin violated the Sixth Amendment. I conclude, however, that Griffin has failed to demonstrate anything more than a possible conflict and therefore respectfully dissent from the majority's decision.

The relevant issue in this case boils down to whether an attorney representing Griffin alone would have presented the innocent bystander defense instead of the alibi

defense at trial. Much of the majority's analysis, however, focuses not on the choice of defenses but rather on the pre-trial discussions that Goldenhersh had with Griffin regarding his defense. Relying completely on the absence of evidence in the record, the majority concludes that no consideration or discussion of possible defenses occurred. Yet it is the defendant's burden to prove that his attorney had an actual conflict of interest in advising him. *See, e.g., Cuyler*, 446 U.S. at 348; *Cirrincione*, 780 F.2d at 630-31 n.4. Accordingly, "[t]he mere possibility of divided loyalties is insufficient to sustain the defendant's burden." *Id.* The district court did not find that Goldenhersh failed to examine with Griffin the weaknesses of the alibi defense and the possibility of presenting an innocent bystander defense. The record on this point is indeed inconclusive.[1] I fear the majority treads on dangerous ground by inferring the absence of specific discussions from an indeterminate record developed over ten years after the fact.

The record does make clear that Griffin told his previous attorney, Ralph Derango, that he was an innocent bystander, that Derango attempted to negotiate a agreement with the police where Griffin would testify against co-defendant Jimmy Smith, and that the police weren't buying Griffin's story. Confronted with this situation, Griffin's family decided to retain Goldenhersh and discharge Derango. And, although the exact nature of the conversations that took place between Griffin and Goldenhersh regarding Griffin's defense is unclear, we do know that, at trial, Goldenhersh presented the alibi defense, and Griffin testified under oath that he and Smith were at a

[1] As the majority points out, Goldenhersh's memory was less than clear regarding the extent to which Goldenhersh discussed the innocent bystander defense with Griffin. Yet Griffin's petition for habeas relief alleged that Goldenhersh erroneously advised him that the innocent bystander defense would fail, not that Goldenhersh neglected to discuss the defense with him. Moreover, the record is silent as to whether Goldenhersh explored with Griffin the dangers of linking his defense to Jimmy Smith's.

tavern playing cards when the murders occurred. Thus, the facts of this case are analogous to those in *United States ex rel. Cole v. Lane*, 752 F.2d 1210 (7th Cir. 1985), where the habeas petitioner abandoned a defense of accusing his co-defendant and testified under oath that neither he nor his co-defendant was involved in the crime. In *Cole*, we stated:

> [W]hen Cole was presented with an opportunity to accuse Cade of committing the armed robbery, Cole denied under oath telling the arresting officers that Cade had committed the crime. It is logical to assume from the record in this case, rather than demonstrating an actual conflict of interest, that in all probability the defendants agreed prior to trial upon a trial strategy of neither defendant testifying against the other. Because there is no evidence in the record that Cole ever pursued the defense of accusing Cade of committing the armed robbery and, to the contrary, disclaimed the defense under oath, we hold that Cole abandoned the defense of accusing Cade. Decisions to pursue or abandon defenses are tactical choices of trial strategy. . . . Since the decision to abandon the defense of accusing Cade was an obvious strategical and tactical decision, it may not be reviewed by this court on appeal.

752 F.2d at 1220. Where a defendant testifies under oath to the truth of a particular defense, we therefore presume that the defendant made a tactical decision to present the defense consistent with his testimony. Such a tactical decision cannot provide the foundation for a claim of actual conflict of interest. *Id.* Of course, the defendant can overcome this presumption of trial strategy by showing that an unconflicted counsel would have pursued a different course of action. *See, e.g., Cirrincione*, 780 F.2d at 631.

The evidence against Griffin left Goldenhersh with two options: he could have presented the alibi defense or the innocent bystander defense. The majority attempts to distinguish *Cole* by concluding that an unconflicted counsel representing Griffin would have presented a defense based

on inconsistencies in the testimony identifying him as a shooter. Yet the majority fails to concretely evaluate the relative strengths of the two potential defenses that were available to Griffin. Only by comparing the strengths and weaknesses of the two defenses can we decide whether an unconflicted counsel would have presented the innocent bystander defense rather than the alibi defense.[2] Certainly, the evidence supporting the alibi defense was weak at best. The alibi was only partially corroborated by Priscilla Smith, and extensive evidence placed both Griffin and Jimmy Smith at the scene of the crime. Furthermore, the defense had the disadvantage of connecting Griffin's story to that of Jimmy Smith, who was consistently identified by witnesses as a shooter. This is not to say that the alibi defense lacked any advantages. We have noted that "[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Cole*, 752 F.2d at 1220 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 482-83 (1978)). Although it may have been unlikely that Jimmy Smith would have testified against Griffin if they had been afforded separate trials, by presenting the alibi defense Goldenhersh eliminated this possibility entirely.

The majority posits that Griffin could have pursued a defense based on the inconsistencies identifying him as a shooter. I agree with the majority's assessment that the evidence at trial did not conclusively demonstrate that Griffin was a shooter. Yet the prosecution's case against Griffin was broader, implicating him as at least an accomplice to the murders. Both Robinson and Kellick clearly placed Griffin at the scene of the crime in a group of

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[2] Much of the majority's opinion focuses on the relative strength of the cases against Griffin and Jimmy Smith. The fact that the case against Jimmy Smith was stronger than that against Griffin is relevant to evaluating the risks of linking Griffin's defense to that of Smith. It does not, however, directly determine the ultimate issue of whether an unconflicted counsel would have presented the innocent bystander defense.

three men who committed the murders. To respond to this evidence, Goldenhersh could have presented the innocent bystander defense—Griffin could have taken the stand and testified that, although he was at the scene of the crime, he had nothing to do with the murders. Accomplice liability in Illinois is broad, however, and this defense would not have provided much hope for Griffin. Under Illinois law, a person is legally accountable for the conduct of another when "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2. Although a person's mere presence at the scene of a crime is insufficient to impose criminal liability, active participation in a crime is not necessary for liability to be based on a theory of accountability. *People v. Davis*, 626 N.E.2d 1187, 1202 (Ill. App. Ct. 1993). The Illinois Supreme Court has stated:

> If the proof shows that a person was present at the commission of the crime without disapproving or opposing it, it is competent for the trier of fact to consider this conduct in connection with other circumstances and thereby reach a conclusion that such person assented to the commission of the crime, lent to it his countenance and approval and was thereby aiding and abetting the crime. Stated differently, circumstances may show there is a common design to do an unlawful act to which all assent, and whatever is done in furtherance of the design is the act of all, making each person guilty of the crime.

People v. Morgan, 364 N.E.2d 56, 60 (Ill. 1977) (quoting *People v. Washington*, 186 N.E.2d 259, 261 (Ill. 1962)). Other factors that Illinois courts have used to determine whether a defendant can be liable on an accountability theory include his association with the co-defendants (e.g., common arrival at the scene), flight from the scene, continued association with the perpetrators after the criminal act, and failure to report the incident. *See Morgan*, 364

N.E.2d at 60; *Davis*, 626 N.E.2d at 1202; *People v. Jones*, 299 N.E. 2d 77 (Ill. App. Ct. 1973) (holding defendant accountable for murder committed by co-defendant based on evidence that they arrived at scene together and fled together after murder).

In light of the law of accountability and the evidence against Griffin, the innocent bystander defense was far from promising. Robinson testified that Griffin and another man entered the apartment during the first set of murders, then drove away in Griffin's car, and returned to the apartment together immediately before Walker was murdered. These facts, combined with no evidence (apart from Griffin's presumed testimony) showing that Griffin attempted to disassociate himself from the crime or call the police, would have been severely damaging to a claim by Griffin that he was merely an innocent bystander. *See, e.g.*, *Morgan*, 364 N.E.2d at 60; *Davis*, 626 N.E.2d at 1202; *Jones*, 299 N.E. 2d 77. Moreover, the testimony identifying Griffin as one of the shooters would only have increased the likelihood of the jury finding him guilty of murder. *See, e.g.*, *Davis*, 626 N.E.2d at 1202 (finding some evidence that defendant may have actually shot at victim supported guilty verdict based on accountability theory).

Comparing the likelihood of success of the two defenses that were available to Goldenhersh, I cannot conclude that an unconflicted counsel would have presented the innocent bystander defense. Given the evidence in this case, Griffin was fighting an uphill, and ultimately losing, battle. Although the probability of a successful alibi defense appears close to nil, the likelihood of a successful innocent bystander defense was not significantly greater.[3] Griffin has

[3] The majority distinguishes *Cole* as a case in which "the avenues of inquiry closed off by the joint representation were of little consequence." Maj. Op. at 18. Yet there is no reason to believe that Griffin's innocent bystander defense would have had a better chance of success than the potential defense that was foreclosed in *Cole*.

therefore failed to demonstrate specific instances where an unconflicted counsel representing him would have acted differently.[4] Griffin cannot sustain his burden of demonstrating an actual conflict by showing that it was possible that Goldenhersh's choice of the alibi defense was a product of divided loyalties. *See, e.g., Cirrincione*, 780 F.2d at 630-31 n.4. For that reason, I have determined that Griffin's Petition for Writ of Habeas Corpus should not be granted.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] To support its finding of conflict, the majority also points to Goldenhersh's use of the scapegoat argument and his confusion of the defendants at trial. Although the scapegoat argument may have been unhelpful, and even prejudicial, to the defendants, it appears to have been the result of bad trial strategy rather than any conflict of interest. Given the weakness of both of Griffin's potential defenses, Goldenhersh very likely would have made the same argument regardless of the defense chosen. Similarly, Goldenhersh's confusion of the two defendants and the evidence against each of them may exhibit incompetence, but it does not demonstrate a conflict of interest. Griffin has not made a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which provides relief for defendants who can demonstrate that their counsel's deficient performance prejudiced their defense.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 23, 1996

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

LEE O. GRIFFIN,

Petitioner-Appellee,

No. 95-2330 v.

RICHARD D. McVICAR, Warden,
Shawnee Correctional Center,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 91 C 228—Gerald E. Cohn, Magistrate Judge.

ORDER

This case is before the court on a petition for rehearing and suggestion for rehearing *en banc* filed by the Appellant. No judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is, hereby DENIED.

In addition, this court's opinion of May 21, 1996 is hereby amended by inserting, after "Petition for Writ of Habeas Corpus," in the last line on page 21 of the slip opinion, the following footnote 11:

> The State has not argued in its petition for rehearing that this case is affected by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (the Antiterrorism Act), which amends the procedures and standards applicable to petitions for writs of habeas corpus. In *Lindh v. Murphy, No. 95-3608*, issued September 12, 1996, this court *en banc* considered and decided a number of issues involving the application of the Antiterrorism Act. Among other things, we decided that a state may waive the benefits of the amended 28 U.S.C. §2254(d) (slip op. at 13). That being the case here, we need not further consider the application of the Antiterrorism Act.

App. 31

[Dated May 3, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LEE OTIS GRIFFIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Civil No. 91-228/6Bc
	)	
	)	
RONALD HAWS, WARDEN,	)	
	)	
Respondent.	)	

ORDER

Pursuant to 28 U.S.C. 636(c), the parties have consented to final entry of judgment by a United States Magistrate Judge. A Notice of Referral was entered by the Clerk of this Court on January 23, 1992, pursuant to an Order of Chief Judge William D. Stiehl.

Petitioner, an inmate at the Centralia Correctional Center, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 on March 25, 1991.

This matter is before the Court on Remand from the Seventh Circuit Court of Appeals. In response to the Remand Order, the parties have briefed the issue. A hearing was held on this matter on April 7, 1995.

Petitioner, Lee Otis Griffin, is currently incarcerated at the Shawnee Correctional Center serving three concurrent 40 year terms for murder and one 30 year concurrent sentence for armed violence. The petitioner was con-

victed of the charges following a jury trial in the Circuit Court of St. Clair County, Illinois, on June 4, 1981.

After his conviction, the petitioner and his co-defendant filed a direct appeal raising the following grounds for relief: (1) that the trial court erred by admitting black and white photographs of the murder victims taken at the morgue; (2) that the trial court erred in sustaining objections to defense counsel's questioning about a prosecution witness' "rap sheet"; (3) that the trial court improperly admitted hearsay testimony regarding statement's made by murder victim as he lay injured in supermarket; (4) that defendant was given ineffective assistance of counsel since dual representation of defendants foreclosed an antagonistic defense of the petitioner; and (5) that the failure of defense counsel to object to improper police procedure constituted ineffective assistance of counsel. After briefing and argument, the appellate court affirmed the conviction. *People v. Griffin*, 463 N.E.2d 1055 (5th Dist. 1983) (J. Starnes, dissenting). On further review, the Illinois Supreme Court affirmed the decision of the appellate court. *People v. Griffin*, 487 N.E.2d 599 (1985).

Petitioner next filed a series of post-conviction petitions. On March 18, 1992, petitioner filed a post-conviction petition alleging that Charles Kellick, the state's key witness, had perjured himself at trial. On August 4, 1982, a subsequent petition alleging ineffective assistance of trial counsel was filed. These two petitions were consolidated and the appellate court, with Justice Welch dissenting, reversed the conviction and remanded the cause for a new trial. *People v. Griffin*, 463 N.E.2d 1063 (5th Dist. 1984). In remanding the case, the appellate court found that trial counsel's representation had been

ineffective due to a failure to request a severance on grounds of conflict of interest and in putting on a defense which was injurious to the defendant when defense counsel was aware of another plausible defense. On December 20, 1985, the Illinois Supreme Court reversed the appellate court's decision finding that Marvin Goldenhersh, petitioner's trial counsel, had not labored under a conflict of interest. *People v. Griffin*, 487 N.E.2d 599 (1985).

Petitioner next filed a *pro se* petition for post-conviction relief alleging that 1) Charles Kellick knowingly falsified material testimony at trial; 2) that the State knowingly used this falsified testimony; 3) that the State suppressed evidence of the fact that Charles Kellick was unable to positively identify Mr. Griffin at the scene; and 4) that the State induced Scott Kellick to distort facts concerning testimony favorable to the defendant at the post-conviction hearing. This petition was amended by counsel on August 10, 1987, and alleged that 1) there was an insufficient number of black jurors on the jury venire and that the court and state systematically excluded black jurors by peremptory challenges or for cause; 2) that the number of jurors from the defendant's race was substantially under-represented on the venire from which the defendant's jury was selected; 3) that the East St. Louis Police Department knew of and assisted in Charles Ray Kellick's giving perjured testimony; 4) that the police wrongly suggested to Kellick that Griffin was involved in the crime; and 5) that the State violated its agreement with the defendant when it released witnesses prematurely, thereby making the witnesses unavailable to the defense. On January 8, 1988, this petition was again amended to additionally allege: 1) that the defendant was denied effective assistance of counsel

for failure to raise on appeal the issue of exclusion of blacks from the defendant's jury; 2) that the State had induced Scott Kellick to distort facts that were material to the defendant's post-conviction petition and furthermore induced Scott Kellick to recant his post-trial affidavit; and 3) that during the trial, the jury heard evidence that was not part of the record. This last petition was denied by the trial court on March 4, 1988, in an order which dismissed all allegations except the claim of incompetency of counsel. On that issue, the trial court found that appellate counsel had not been incompetent.

Petitioner, a self-admitted perjurer, has now filed the instant federal habeas action alleging that he was denied his Sixth Amendment right to the effective assistance of counsel because a conflict of interest existed between petitioner and his codefendant. Petitioner alleges that this conflict adversely affected defense counsel's performance because it limited his ability to properly cross-examine witnesses. Furthermore, the conflict of interest affected trial counsel who chose to proceed with a united alibi defense which counsel knew to be perjured and which ensured petitioner's conviction.

FACTUAL BACKGROUND

In its opinion affirming the conviction of the petitioner, the Illinois Supreme Court set forth the factual summary of the facts presented at trial:

> On February 5, 1981, Charles Sims, Christi Smith and Ronald Walker were fatally shot and Charles Kellick was severely wounded in an East St. Louis apartment. Kellick, the survivor, testified that on February 5, 1981, he and two friends, Charles Sims

and Velva Robinson, drove in his truck to an apartment occupied by Christi Smith and Ronald Walker. Sims first entered the building alone and returned to the truck saying that he heard Christi Smith crying. Sims again entered the building, this time accompanied by Kellick. Kellick stated that he and Sims entered the unlocked apartment and discovered Christi Smith in the bathroom with the defendant. As Sims stepped into the bathroom, the defendant shot him. Kellick turned and ran, and on his way out he brushed past two other men. (He did not identify these two men, but from the record they are presumed to have been Jimmy Lee Smith, the codefendant here and Will Hudson, a third man who was never apprehended.) Before he reached the front door, he was shot in the back of the head. He did not know who shot him. While he lay on the floor, Jimmy Smith shot him in the face. Kellick feigned death until the men left, at which time he hid in a compartment under the stairway. A police officer testified that when he questioned Kellick at the hospital Kellick said that he did not know who had done the shootings. Kellick testified that he did not remember this incident. Five days later he identified Griffin in a video lineup. He said that he had seen Griffin on two prior occasions and Smith on one occasion. Kellick said that he learned later that Christi Smith's apartment was considered to be a 'dope house.' Kellick testified that there was a pending criminal charge of truck theft against him and that the case was set to be heard subsequent to his testimony at the defendant's trial. He stated that he was aware of no agreement with the State as to the pending case regarding his cooperation with the prosecution and that he had not discussed the matter of an agreement with his attorney.

Velma Robinson testified that at 5 p.m. on February 5, 1981, she accompanied Kellick and Sims to the apartment building. Upon arriving, Robinson observed a red and white Cadillac pull behind their truck. Immediately after Kellick and Sims entered the building she saw two men leave the Cadillac and follow Kellick and Sims into the building. She identified the defendant as one of the two men. 'A few seconds' after the two men entered the building, she heard a shot. Minutes later, the same two men left the building. They reentered the Cadillac, pulled in front of Kellick's truck, waited five minutes, and then drove away. Five minutes later, Robinson observed Ron Walker enter the building. He was followed into the building by the two men from the Cadillac. Minutes later, she heard another shot. At this time Robinson drove off in Kellick's truck and reported the incidents to the police.

Ron Walker suffered five gun shot wounds but managed to make his way to a nearby grocery store. Just before he died he told several witnesses of the shooting. (His statements were admitted as a dying declaration over defense objection.) Lionel Settles, an East St. Louis police officer, was working that evening as a security guard at the grocery store. He testified that Ron Walker ran into the store bleeding heavily from bullet wounds. According to Settles, Walker said that when he entered his apartment, he found two dead persons, a man and a woman, on the floor. The woman was his girlfriend, Christi Smith. Settles said that Walker stated a man named 'Lee' had shot him, and he identified Lee as the owner of a furniture store in East St. Louis. A man called 'Rush City Jimmy' had shot his girlfriend, Walker said.

Darrell Rice, an Illinois State Trooper who was shopping at the store that evening, was conversing with Settles at the time that Walker entered the store. According to Rice, Walker stated that Lee's friend had shot him, and that 'Rush City Jimmy' had shot his girlfriend.

David Winchester, an assistant manager of the store, was also a witness to a portion of Walker's statement. He said that he heard Walker talk about 'a guy that ran a furniture store.' Winchester didn't hear Walker say who shot him, but he heard him say 'Rush City Jimmy' had shot his girlfriend.

Based on Walker's statement, police began a search for the defendant. That evening an officer on patrol observed him leaving a liquor store. He said that the defendant stepped back into the store and emerged a few minutes later wearing a different hat. The defendant and woman companion entered a station wagon and made a U-turn. As the patrol car moved to block the U-turn, Griffin drove around the police car into a vacant lot. The officer left his car and walked toward the defendant, at which time he turned off the motor. Officer Hendricks testified that he believed that the defendant had attempted to evade him. Griffin was placed under arrest and taken to the police station. Jimmy Lee Smith was arrested several days later. The defendant's white and red Cadillac was found abandoned in a wooded area of East St. Louis.

At the grand jury hearing, detective sergeant L.C. Moore, of the East St. Louis police department, who was in charge of the investigation of the murders, was a witness. He testified that at the police station following his arrest the defendant 'grabbed' a phone and was overheard saying 'get rid of the car; he's on to it, report it stolen.' The witness also testified that

when arrested the defendant told an officer he didn't do it, and when Moore served a warrant on the defendant in jail he stated that "it wasn't his idea to kill anyone." Moore also stated to the grand jury that "Jimmy Lee Smith doesn't believe in going back to jail"; that he was the type who would "leave no witnesses."

The defendant testified at trial that he operated a family-owned furniture store in East St. Louis and that he was the owner of a red and white Cadillac. He testified that he and Jimmy Lee Smith were at a tavern playing cards from 5 to 7 p.m. when the shootings took place. He said that although his Cadillac was in operating order, he did not use it that afternoon of [sic] evening. He said that morning he went six blocks by bus to borrow his sister-in-law's Ford Maverick and used it that day. He admitted having called his wife from the police station and having told her to report his Cadillac stolen. He testified that he had told her that only after she told him that their car was not at the furniture store. Griffin's codefendant, Jimmy Smith, did not testify at their joint trial. *Griffin III*, 487 N.E.2d at 600-601.

INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment requires that criminal defendants receive effective assistance of counsel at all stages of the proceedings against them. *Strickland v. Washington*, 466 U.S. 668 (1984); *Johnson v. Duckworth*, 793 F.2d 898, 900-02 (7th Cir.); *cert. denied,* 479 U.S. 937 (1986). *Strickland* requires that a defendant alleging ineffective assistance of counsel demonstrate [sic] that 1) counsel's performance fell outside the "wide range of professionally competent assistance" and, 2) a reasonable probability

exists that counsel's errors changed the outcome of the proceeding. *Strickland,* 466 U.S. at 690, 694. Assistance free from conflicts of interest is implicit in the concept of effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

"Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of the constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas,* 435 U.S. 475, 482 (1978). Many times "[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurther, J. dissenting). When joint representation is not objected to at trial, the habeas petitioner must show: 1) that petitioner and another defendant were jointly represented by counsel; 2) that there was an actual conflict of interest between the co-defendants; and 3) the alleged conflict of interests affected the adequacy of legal representation afforded the defendants. *Dently v. Lane*, 665 F.2d 112, 116 (7th Cir. 1981).

The Sixth Amendment guarantees a defendant in a criminal trial the right to conflict free representation. *Cuyler v. Sullivan*, 446 U.S. at 335. See, *United States v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985). A conflict of interest exists, "whenever a defendant stands to gain significantly by counsel's adducing probative evidence or advancing plausible arguments that are damaging to the cause of the co-defendant who [sic] counsel is also representing." *Gray v. Lane*, 721 F.2d 586, 596-97 (7th Cir. 1983), *cert. denied*, 466 U.S. 909 (1984), quoting, *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975); *Zembroski v. DeRobertis*, 598 F. Supp. 914, 921

(N.D. Ill. 1984). An actual conflict of interest can be determined only after examination of specific instances in the record. *United States v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985). Actual conflict is an actual divergence of interests on the part of the defendants such that pursuing the interest of one would be antagonistic to another. *Zembroski v. DeRobertis*, 598 F. Supp. at 920. Where two or more defendants have inconsistent stories relating to the crime charged, joint representation is impermissible. *Williams v. Franzen*, 687 F.2d 944 (7th Cir. 1982).

This case is troubling to the Court and suggests that a per se ban against multiple representation might be in order. Since the petitioner has admitted committing perjury during the pendency of this matter, the Court is extremely hesitant to allow him to benefit from his wrongdoing. However, questions exist concerning trial counsel's representation of the petitioner at trial.

At the time of petitioner's arrest, it appears that he had two defenses available to him. One, the innocent by-stander defense and, two, an alibi defense. On his arrest, petitioner began to explore the innocent by-stander defense with his initial attorney, Ralph Durango. Mr. Durango contacted the local police and attempted to negotiate on behalf of his client, making certain representations as to petitioner's presence at the crime scene and his ability to identify the shooter. This position appears justified because the evidence did indicate the petitioner's presence at the crime scene. However, these negotiations were not fruitful and Mr. Durango was discharged as counsel in favor of Marvin Goldenhersh.

At the time Mr. Goldenhersh was retained to represent the petitioner, he was already representing Rush City

Jimmy Smith. Rush City Jimmy was a convicted felon with a lengthy criminal history, as opposed to the plaintiff, who did not have a criminal history. This arrangement would be untenable should the petitioner choose to pursue an innocent by-stander defense.

During his deposition, Marvin Goldenhersh insisted that he proceeded on the alibi defense at the petitioner's insistence and that they never discussed an accountability theory of defense. This assertion is contradicted by the petitioner and possibly by the pre-trial record. Prior to the trial, Mr. Goldenhersh filed a Motion to Sever the trials of his two defendants. Such motions are clearly indicated when one defendant has a defense antagonistic to another defendant. In addition, an innocent by-stander defense fits with the facts known prior to trial. Petitioner apparently made several admissions against interest which put him at the scene, witnesses, as well as victims identified him as being present. These facts, coupled with the plea negotiations Ralph Durango had pursued on petitioner's behalf indicate that petitioner had a viable alternate defense available.

The Court must consider which defendant would have benefitted by presenting the alibi defense. Jimmy Smith, as a convicted felon, was unable to testify. It is clear, only Jimmy Smith would have benefitted from an alibi defense. In joint trial, only the petitioner was able to take the stand in their behalf to present the alibi defense. Marvin Goldenhersh had two clients with differing interests. Only by presenting an alibi defense could counsel have represented both clients. The existence of an innocent by-stander defense for the petitioner made his position antagonistic to Rush City Jimmy's. Finally, the

record is clear that the petitioner never waived the conflict inherent in the dual representation.

Based upon a review of the record, the Court finds that a conflict of interest existed between defendants Lee Otis Griffin and Rush City Jimmy Smith. Since a conflict existed between these two defendants, joint representation of the defendants was precluded. Therefore, the joint representation of these clients by Marvin Goldenhersh rose to the level of ineffective assistance of counsel to petitioner, Lee Otis Griffin.

Accordingly, for the above-stated reasons, IT IS THE ORDER of this COURT that petitioner's Petition for Writ of Habeas Corpus is hereby GRANTED and respondent is directed to either release the petitioner or retry him within ninety (90) days.

Dated this 3rd day of May, 1995.

_____

GERALD B. COHN
UNITED STATES MAGISTRATE JUDGE

ORIGINAL

Supreme Court, U.S.
FILED
FEB 3 1997
CLERK

NO. 96-1041

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

CHARLES M. SCHIEDEL
Deputy Defender
Office of the State Appellate Defender
Supreme Court Unit
400 South Ninth Street, Suite 101
P.O. Box 5720
Springfield, IL 62705-5720
Counsel of Record

DANIEL D. YUHAS
Deputy Defender
Office of the State Appellate Defender
Fourth Judicial District
400 S. 9th Street, Suite 102
P.O. Box 5750
Springfield, IL 62705-5750
(217) 782-3654

COUNSEL FOR RESPONDENT

ARDEN J. LANG
Assistant Defender

OF COUNSEL

25 pp

NO. 96-1041

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent, Lee Otis Griffin, respectfully requests this Court, in accordance with his attached affidavit, for leave to file a Brief in Opposition to the Petition for Writ of Certiorari without payment of costs and to proceed *in forma pauperis* pursuant to Rule 46.

CHARLES M. SCHIEDEL
Deputy Defender
Office of the State Appellate Defender
Supreme Court Unit
400 S. 9th Street, Suite 101
P.O. Box 5720
Springfield, IL 62705-5720
(217) 782-1989

COUNSEL FOR RESPONDENT

ARDEN J. LANG
Assistant Defender

OF COUNSEL

IN FORMA PAUPERIS AFFIDAVIT

IN THE

UNITED STATES SUPREME COURT

RICHARD D. McVICAR, Petitioner

vs.

LEE OTIS GRIFFIN,
Respondent.

AFFIDAVIT IN SUPPORT
OF REQUEST TO PROCEED
IN FORMA PAUPERIS

I, Lee Otis Griffin, being first duly sworn, depose and say that I am the Respondent in the above-entitled cause; that in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes (x) No ( )

(a) If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer.

$450.00 per month (Gross) Four hundred & Fifty Dollars

Idea M. Myers, 308 North Illinois Belleville IL 62220

"Special Note:) MUST SUBTRACT My Room & Board @ 400.00 PER Month BALANCE REMAINING 50.00 PER MONTH CLEAR..

(b) If the answer is "no," state the date of past employment and the amount of the salary and wages per month which you received.

---

2. Have you received within the past twelve months any money from any of the following sources?

(a) Business, profession or form of self-employment?

Yes ( ) No (X)

(b) Rent payment, interest or dividends?

Yes ( ) No (X)

(c) Pensions, annuities or life insurance payments?

Yes ( ) No (X)

(d) Gifts or inheritances?

Yes ( ) No (X)

(e) Any other sources?

Yes ( ) No (X)

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

N/A

3. Do you own cash, or do you have money in checking or savings accounts?

Yes ( ) No (X) (Include any funds in prison accounts)

If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ( ) No (X)

If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

N/A

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Lee O. Griffin

LEE OTIS GRIFFIN, Respondent

STATE OF ILLINOIS)
) SS
COUNTY OF ST. CLAIR)

LEE OTIS GRIFFIN, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct to the best of his knowledge and belief.

Lee O. Griffin

LEE OTIS GRIFFIN
Respondent

Subscribed and sworn to
before me on this 28th
day of January, 1997.

Dorothy Schobert
NOTARY PUBLIC

"OFFICIAL SEAL"
Dorothy Schobert
Notary Public, State of Illinois
My Commission Expires 10/31/98

NO. 96-1041

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES M. SCHIEDEL
Deputy Defender
Office of the State Appellate Defender
Supreme Court Unit
400 South Ninth Street, Ste. 101
P.O. Box 5720
Springfield, IL 62705-5720
(217) 782-1989
Counsel of Record

DANIEL D. YUHAS
Deputy Defender
Office of the State Appellate Defender
Fourth Judicial District
400 S. 9th Street, Suite 102
P.O. Box 5750
Springfield, IL 62705-5750
(217) 782-3654

COUNSEL FOR RESPONDENT

ARDEN J. LANG
Assistant Defender

OF COUNSEL

LIST OF INTERESTED PARTIES

The respondent (hereafter referred to as "Griffin") is correctly identified in the caption as Lee Otis Griffin.

The petitioner (hereafter referred to as the "State") is correctly identified in the petition except that the respondent has been enlarged on bail and does not presently reside at the prison of which Richard D. McVicar is warden. The respondent's last place of incarceration was Centralia Correctional Center in Centralia, Illinois. The warden of that institution is Ronald Haws.

TABLE OF CONTENTS

Page

List of Interested Parties i

Table of Contents ii

Table of Citations iii

The Statutory Provision at Issue 1

A. Course of Proceedings and Disposition of the Case Below 2

B. Correction of Misstatements in the Petition 2

Reasons For Denying the Writ 5

I.

CONTRARY TO THE PETITIONER'S CONTENTION, ***SUMNER V. MATA*** AND ***LOUISVILLE & NASHVILLE R. CO. V. MOTTLEY*** DO NOT SUPPORT THE PETITIONER'S POSITION THAT THE BENEFITS OF AMENDED 28 U.S.C. § 2254 (D) CANNOT BE WAIVED 5

II.

EVEN IF 28 U.S.C. § 2254(d) IS HELD TO BE RETROACTIVE IN NON-CAPITAL CASES, AND THE MATTER CANNOT BE WAIVED BY THE STATE'S FAILURE TO RAISE IT ON APPEAL, THE RESULT OF THE COURT OF APPEAL'S DECISION ON THE MERITS WOULD BE THE SAME 9

Conclusion 14

TABLE OF CITATIONS

Cases Cited: *Page*

Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), amended ___ F.3d ___ 1996 WL 69554 7

Cuyler v. Sullivan, 446 U.S. 335 (1980) 11-13

Eaglin v. Welborn, 57 F.3d 496 (7th Cir. 1995) 5

Emerson v. Gramley, 91 F.3d 898 *(7th Cir. 1996)* 7

Griffin v. Camp, 40 F.3d 170 (7th Cir. 1994) 4

Griffin v. McVicar, 84 F.3d 880 (7th Cir. 1996) 1-3, 10-11

Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (*en banc*), *cert. granted*, 65 U.S.L.W. 26 (January 10, 1997 No. 96-6298) 5, 9

Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149 (1908) 5-7

Huynh v. King, 95 F.3d 1052 (11th Cir. 1996) 7

People v. Griffin, 109 Ill.2d 293, 487 N.E.2d 599 (1985) 8-10

Rehbein v. Clark, 94 F.3d 478 (8th Cir. 1996) 7

Sumner v. Mata, 449 U.S. 539 (1981) 5-8

Tate v. Glenn, 71 F.3d 1204 (6th Cir. 1995), *cert. denied* 58 CrL 1365 (1996) 7-8

Teague v. Lane, 489 U.S. 288 (1989) 5

Watkins v. Meloy, 95 F.3d 4 (7th Cir. 1996) 7

Statutes Cited:

28 U.S.C. 2254(d) 1, 5-9

NO. 96-1041

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, Lee Otis Griffin, requests that the Court deny the petition for *writ of certiorari* seeking review of the opinion and judgment of the Seventh Circuit Court of Appeals reported at ***Griffin v. McVicar***, 84 F.3d 880 (7th Cir. 1996) (May 21, 1996), as amended on denial of rehearing (September 12, 1996). The petition for a *writ of certiorari* was filed on December 20, 1996 (No. 96-1041).

THE STATUTORY PROVISION AT ISSUE

Antiterrorism and Effective Death Penalty Act of 1996.

> An application for the writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d).

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for *writ of certiorari* which contains a number of factual and legal misstatements.

A.

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE BELOW

The opinion of the Court of Appeals as amended on denial of rehearing fully sets out the course of proceedings and disposition of the case below.

B.

CORRECTION OF MISSTATEMENTS IN PETITION AND PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 15.2, this brief corrects several misstatements and omissions in the petition. These misstatements and omissions aim at undercutting the propriety of the Court of Appeals opinion and to minimize the extent of the constitutional violation and its deleterious effect on Mr. Griffin's trial.

The Petition Omits That The Defendant Never Waived His Right To Be Represented By An Attorney Without A Conflict Of Interest.

Perhaps the petition's most significant omissions relate to trial counsel's failure to alert Mr. Griffin to the conflict of interest brought on by counsel's joint representation of two defendants with divergent interests. Both the Court of Appeals and the district court found that Mr. Griffin, who at trial was represented by the same attorney as his co-defendant, was never told by his retained attorney that joint representation might entail a conflict of interest. Moreover, Mr. Griffin never waived his right to conflict-free counsel. (***Griffin v. McVicar***, 84 F.3d 880, 891) This omission has a direct bearing on the Court of Appeals' holding that Mr. Griffin was denied his right to the effective assistance of counsel.

The Petition Does Not Explain The Court Of Appeals Finding That, Operating Under A Conflict Of Interest, Trial Counsel Was Forced To Deal With The Inconsistencies Among The Witnesses To Minimize Damage To The More Culpable Codefendant To The Detriment Of Mr. Griffin.

The petition downplays evidence which an attorney not laboring under a conflict of interest could have used to exculpate Mr. Griffin. In recounting the trial evidence, the petition states that witnesses named Mr. Griffin, his codefendant, and another man as having been involved in the shooting. The petition omits that the witnesses gave highly inconsistent descriptions of the events surrounding the shooting and in their ascribing of blame. As discussed in the District Court order and Court of Appeals opinion, how trial counsel handled these inconsistencies had a devastating effect on Mr. Griffin's right to effective assistance of counsel:

> [Codefendant] Smith did not have a leg to stand on in presenting a defense. He was unequivocally identified as having shot two of the victims and he had an extensive criminal record which effectively precluded him from testifying. Griffin, on the other hand, had the option of pursuing a defense based on the inconsistences in the testimony identifying him as a shooter.
>
> *Griffin v. McVicar*, 84 F.3d at 889.

The Court of Appeals opinion then listed these inconsistencies, even singling one out as being an implied conflict. *Id.* The opinion then listed specific instances where Mr. Griffin's attorney could have and would have done something different if that attorney had represented only one defendant. *Id.*

While Citing With Approval The District Court's First Ruling, Which Denied Mr. Griffin's Habeas Petition, The Petition Fails To State That The Court of Appeals Found These Conclusions Of Law Untrustworthy Because They Were Based On Inconsistent Findings Of Fact.

The petition quotes at length from the district court's first opinion, which denied Mr. Griffin's application for the *writ of habeas corpus*, but fails to mention that the Court of

Appeals concluded that the district court's factfinding contained inconsistencies which called into question its conclusions of law. The Court of Appeals, in remanding the case, wrote at length about the inconsistencies between the district court's findings and the record, particularly: (1) the district court found inconsistencies regarding whether Marvin Goldenhersh discussed the theory of accountability with Mr. Griffin; and, (2) there were inconsistencies in Goldenhersh's deposition regarding whether he was given facts before trial regarding the potential defense that Griffin was an innocent bystander. The Court of Appeals directed the district court on remand to clarify its factual findings and explain whether its new findings would affect its conclusions of law. ***Griffin v. Camp***, 40 F.3d 170, 174 (7th Cir. 1994). The Court of Appeals noted that the district court adopted the Illinois Supreme Court's version of the facts and accepted trial counsel's testimony regarding his knowledge of potential alternative defenses other than the alibi defense. By emphasizing the conclusions of law without fleshing out why the Court of Appeals found them to be untrustworthy, the petition gives the false impression that the district court's first order, and not the second order, on which the Court of Appeals relied, made correct findings of fact and reached factually-supported conclusions of law. It is the District Court's second order whose factual findings support the Court of Appeals conclusion that Mr. Griffin was denied the effective assistance of counsel.

The Respondent's Status

Since the filing of the petition, the State of Illinois' time to retry Mr. Griffin has elapsed. Mr. Griffin has been free on recognizance bond since October 8, 1996.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO THE PETITIONER'S CONTENTION, *SUMNER V. MATA* AND *LOUISVILLE & NASHVILLE R. CO. v. MOTTLEY* DO NOT SUPPORT THE PETITIONER'S POSITION THAT THE BENEFITS OF AMENDED 28 U.S.C. § 2254 (D) CANNOT BE WAIVED.

The Court of Appeals correctly evaluated the effect of the State's failure to raise the statute's applicability to this case. The Court of Appeals has stated:

> We do not suggest that § 2254(d) reduces the power of the court in the sense of subject-matter jurisdiction, which survives intact in 28 U.S.C. § 2241; a state may waive the benefits of 28 U.S.C. § 2254(d), although other provisions of the 1996 Act, such as the revised exhaustion requirement in § 2254(b), suggest that counsel's inattention to niceties of federal practice does not forfeit the benefits the law bestows on the state as an entity. *See Also* ***Eaglin v. Welborn***, 57 F.3d 496, 498-99 (7th Cir. 1995) (*en banc)* (holding that a court *may* decide a case on the basis of ***Teague***[1] even if the state's lawyers overlooked that possibility).
>
> ***Lindh v. Murphy***, 96 F.3d 856, 865 (7th Cir. 1996) (*en banc*), *cert granted*, 65
> U.S.L.W. 26 (January 10, 1997 No. 96-6298). (Emphasis added.)

The Court of Appeals has ruled similarly in this case in opting to omit consideration of the amended § 2254(d) because of the State of Illinois' failure to raise or brief the matter before the denial of rehearing in this case. The State argues that *certiorari* must be granted because of what it characterizes as the inconsistency between the Court of Appeals opinion and this Court's decisions in ***Sumner v. Mata***, 449 U.S. 539 (1981) and ***Louisville & Nashville R. Co. v. Mottley***, 211 U.S. 149 (1908). ***Lindh*** and by extension this case do not "ignore" ***Sumner v. Mata*** and ***Mottley***. There is no conflict between the opinion of the Court of Appeals and holdings of this Court – either real or apparent. Neither case relied on by the State changes the fact that the passage of AEDPA, and the Court of Appeals'

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[1]***Teague v. Lane***, 489 U.S. 288 (1989)

refusal to apply it retroactively in this case, did not remove subject matter jurisdiction from the Court of Appeals or from any other federal court.

Sumner v. Mata and ***Mottley*** do not support the petitioner's position. In ***Sumner***, this Court vacated and remanded the cause and found that courts of appeal should henceforth include support from the record or list which enumerated statutory factor removed the presumption of correctness from the state court's factual findings. 449 U.S. at 551. ***Mottley*** held that a party cannot confer jurisdiction on a federal court by anticipating a defense another litigant might assert, but must present a federal question in his own well-pleaded claim to invoke the jurisdiction of the federal courts. 211 U.S. 149, 152. ***Sumner v. Mata*** involved a *habeas corpus* claim where the issue was whether the Court of Appeals properly analyzed a state court finding by applying the presumption of correctness which § 2254(d) mandated. Although the matter was raised in the district court, it was not briefed or argued before the Court of Appeals. This case stands in contrast to ***Sumner***. Until the Court of Appeals denied rehearing, the State never briefed the matter of AEDPA's applicability to this case. Another difference is that this Court in ***Sumner*** noted that the Court of Appeals' opinion did not apply the presumption of correctness or even refer to § 2254(d) in its opinion. 449 U.S. at 547. Yet, the Court of Appeals opinion in this case specifically found the State's inaction as a waiver of the matter and thus chose not to decide the case based on amended § 2254(d). The deference to state court factfinding demanded of the Court of Appeals in ***Sumner*** has not been abrogated by the Court of Appeals in this case. Although not explicitly analyzing the State Court factfinding in this case in light of § 2254(d), the Court of Appeals opinion contains the basis for concluding that the State Court factfinding was unreasonable. *See* This Brief at Reason for Denying the Writ, II, pp. 9-13.

The State's reliance on ***Sumner*** is based on a footnote to the opinion. ***Sumner*** adopted the reasoning of ***Mottley*** that this Court is duty bound to see that the jurisdiction of the court, "which is defined and limited by statute, is not exceeded." 449 U.S. at 457, n.2, citing ***Mottley, 211 U.S. 149, 152***. The footnote explained that because this Court had the benefit of the full briefing and argument from the parties on the § 2254(d) argument, it would decide the § 2254(d) issue. 449 U.S. at 547, n.2. Although the State of Illinois would have this Court give footnote 2 an expansive reading, it must be noted that there are no reported cases found by counsel to support that position. ***Sumner***'s footnote has never been cited as authority. Instead, the Courts of Appeal have taken a tack similar to the Court of Appeals' position in this case.

The Court of Appeals opinion is not alone in finding that a party may waive the benefits of AEDPA. The Seventh Circuit has specifically held this way in ***Lindh v. Murphy***, ***Emerson v. Gramley***, 91 F.3d 898, and ***Watkins v. Meloy***, 95 F.3d 4 (7th Cir. 1996). In addition, the Fourth Circuit held that since a petitioner did not ask the court to apply AEDPA to a pending non-capital case, the court did not apply it. ***Beaver v. Thompson***, 93 F.3d 1186 (4th Cir. 1996), amended --- F.3d --- 1996 WL 69554. Similarly, where neither party argued for the application of AEDPA, and the petition was filed prior to the date the Act took effect, the Court of Appeals did not consider the issue. ***Huynh v. King***, 95 F.3d 1052 (11th Cir. 1996). Similarly, in ***Rehbein v. Clark***, 94 F.3d 478, 481 n.4 (8th Cir. 1996), the Court of Appeals noted that the parties seemed to agree that the AEDPA's provisions should not be applied to Rehbein's appeal.

In a case which is roughly in the same posture as this case, this Court has denied the State of Ohio's *petition for certiorari*. ***Tate v. Glenn***, 71 F.3d 1204 (6th Cir. 1995), *cert. denied*, 58 CrL 1365 (1996). ***Tate v. Glenn*** was a capital death case in which the Court of Appeals held the defendant had received ineffective assistance of counsel. The case was decided

before the effective date of the AEDPA but was still pending in the federal system. In its petition for *certiorari* to this Court, the state argued for the first time that the recently enacted amendments to 28 UCS § 2254 required reversal or remand of the decision vacating the death sentence. This Court denied the petition for *certiorari*. ***Tate v. Glenn*** differs from ***Lindh*** because, unlike ***Tate***, the litigants in ***Lindh*** had briefed the issue for the Court of Appeals sitting *en banc*. In this case, the State never briefed the matter in the Court of Appeals. (*See* ***Ante*** at pp 7-10) The need to grant *certiorari* in this case is no more compelling than it was in ***Tate***.

By contrast to the cases from several Court of Appeals circuits which have either declared that the AEDPA has no retroactive application to non-capital cases, declined to decide pending non-capital cases in light of the AEDPA where the state failed to present the issue on appeal, or found that the matter had retroactive application but was waived and the court decided not to apply the Act on its own, there are no reported cases where a lower court has found the Act confers subject matter jurisdiction and therefore its application cannot be waived. There is no need for this Court to offer instruction to lower courts when the law is well-settled, as it is here.

In this case, the requirements of § 2254(d) as it existed at the time the briefing and argument in the Court of Appeals, was followed to the letter. Moreover, the Court of Appeals decision was preceded by similar rulings on the federal issue by the federal district court and by a majority of a State Appellate Court. ***People v. Griffin***, 124 Ill.App.3d 169, 463 N.E.2d 1063 (5th Dist. 1984). By contrast to ***Sumner***, the Court of Appeals in this case always had jurisdiction to consider this case and acted within its grant of jurisdiction. To apply the ***Sumner*** footnote to this case would create the unforetold result of removing a federal court's jurisdiction to consider this case after two federal courts, having jurisdiction, acted within their grant of jurisdiction. Assuming the validity

of ***Lindh's*** holding that the AEDPA requires retroactive application to non-capital cases pending on appeal in federal court, the Court of Appeals was acting within its authority in choosing not to apply AEDPA's more limited standard of review. The AEDPA did not remove the Court of Appeals' subject matter jurisdiction. This Court's review of this decision in not warranted.

II.

EVEN IF 28 U.S.C. § 2254(d) IS HELD TO BE RETROACTIVE IN NON-CAPITAL CASES, AND THE MATTER CANNOT BE WAIVED BY THE STATE'S FAILURE TO RAISE IT ON APPEAL, THE RESULT OF THE COURT OF APPEAL'S DECISION ON THE MERITS WOULD BE THE SAME.

The State mistakenly argues that despite its never having raised the applicability of the AEDPA, the Court of Appeals *sua sponte* should have "rightfully applied [***Lindh***] in this case." But irrespective of this Court's ruling in ***Lindh v. Murphy***, the AEDPA will not change the result in this case. Mr. Griffin will still prevail under amended § 2254(d)(2) because the State Court decision, ***People v. Griffin***, 109 Ill.2d 293, 487 N.E.2d 599 (1985), is based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding. This unreasonable determination was responsible for the State' Court's erroneous conclusion of law that Mr. Griffin's constitutional right to conflict-free counsel had not been violated.

The State Court's faulty factfinding is skewed by the State Court's insistent focus on whether Mr. Griffin lied when he testified in a post-conviction hearing that he told his trial counsel he was at the scene as an innocent bystander. The State Court opinion analyzed the grand jury proceedings and the testimony of Mr. Griffin and his original trial counsel, Ralph Derango. The State Court found that Mr. Griffin might have told trial counsel something other than he told Mr. Derango. Mr. Derango testified that Mr. Griffin told him he was at the scene and did not participate in the killings. The State Court also concluded

that the grand jury testimony did not affirmatively establish that trial counsel was aware of his client's present-but-innocent claim. The State Court found that Detective Moore's grand jury testimony did not definitively demonstrate whether Mr. Griffin told the police he was an innocent bystander. ***People v. Griffin***, 487 N.E.2d at 603.

At the core of the State Court factfinding is a glaring omission. Consideration of that omission not only would have contradicted the other State Court findings but also supports the Court of Appeals conclusions of law. The fact omitted from the State Court's calculus is that, before trial, Marvin Goldenhersh filed a motion to sever his clients' cases. Trial counsel's reason for seeking a severance demonstrates exactly what counsel knew. Mr. Goldenhersh was "concerned with the potential effects of Griffin's damaging admission on [codefendant] Smith's case." ***Griffin v. McVicar***, 84 F.3d at 887-88, n.6. Although the State Court found Detective Moore's testimony before the grand jury to be too ambiguous to determine if the testimony put Marvin Goldenhersh on notice that Mr. Griffin had told the police he was present but innocent, obviously Mr. Goldenhersh was not confused by the testimony. Goldenhersh knew Mr. Griffin admissions about being at the scene contradicted the alibi defense Goldenhersh expected to mount. Goldenhersh did not want these admissions to adversely affect the fortunes of his other client, Jimmy Smith. Had the State Court considered the implications of the motion to sever, it would not have found Mr. Griffin's statements to the police to be ambiguous and would not have used this finding to justify its conclusion that the credibility issue must be determined against Mr. Griffin. The State Court opinion noted that no conflict manifested itself during trial since counsel presented a joint bystander defense. Therefore, critical to the State Court's conclusions of law, it found nothing in the trial or post-conviction record to disturb what it mistakenly characterized as the post-conviction court's determination that Mr. Griffin's testimony was not credible. 485 N.E.2d at 604.

In stark contrast to the State Court determination, the Court of Appeals opinion correctly concluded that this case does not hinge on a credibility determination as to what Mr. Griffin told Goldenhersh. In fact, for purposes of determining the outcome of this case, the Court of Appeals accepted the State Court's conclusion that Mr. Griffin did not tell Goldenhersh about being present-but-innocent. 84 F.3d at 887-88, n.6. The Court of Appeals summarized the information Mr. Goldenhersh possessed about the present-but- innocent defense and found that, "[g]iven all of this available information, we cannot accept the conclusion that Mr. Goldenhersh was unaware of the difficulties with the alibi defense and the possibility of an innocent bystander defense." 84 F.3d at 887-88.

The Court of Appeals' affirmance of the District Court's decision granting Mr. Griffin's *writ of habeas corpus* is grounded in ***Cuyler v. Sullivan***, 446 U.S. 335 (1980), which predates the State Court proceedings in this case. As the Court of Appeals opinion asserts, ***Cuyler*** established the standard for a finding of ineffective assistance of counsel based on multiple representation. That is, for a petitioner to succeed, there must be an actual conflict of interest which adversely affected his lawyer's performance. ***Griffin v. McVicar***, 84 F.3d at 886-87, citing ***Cuyler***, 446 U.S. at 348. Guided by ***Cuyler***, the Court of Appeals first elaborated on trial counsel's actual conflict:

> [Trial counsel] was possessed of information which would have suggested to an unconflicted counsel the availability of a defense focused on discrediting the identification of Griffin and shifting the blame onto Jimmy Smith.
>
> 84 F.3d at 887.

The Court of Appeals concluded that it is possible that:

> counsel may be ineffective if the joint representation precludes an obvious and viable alternative defense when the common defense is so completely untenable. Failure to consider the possible defenses with a mind to the best interests of a client is particularly likely when the alternative to a

> common defense is helpful to one client but is highly detrimental to the other (as was the case here).
>
> 84 F.3d at 888.

As the Court of Appeals noted, that by contrast to trial counsel:

> An attorney free to consider Griffin's singular interest would, particularly in light of Griffin's waffling on his story, have pointed out the possibility of resting a defense on the weakness and contradictions in the testimony implicating him in the shootings. This approach would have compared favorably with bringing in an alibi which left Griffin with the task of refuting the evidence against Smith as well.
>
> *Id.*

In light of *Cuyler*, the Court of Appeals opinion then enumerated several instances in the record where an unconflicted counsel would have acted in Mr. Griffin's interests as opposed to his codefendant's interests. 84 F.3d at 889-90. The opinion noted that had Goldenhersh only represented Mr. Griffin, at trial he could have "impeached the identifications of Griffin as a shooter by exploiting obvious inconsistencies in testimony." 84 F.3d at 890. Additionally, an unconflicted counsel "would not have had to resort to the suggestion that the victims implicated Griffin in order to frame him because they were responsible for his brother's death a few weeks earlier." *Id.* Furthermore, Goldenhersh gave the jury a highly prejudicial incorrect impression by arguing that Mr. Griffin was accused of shooting Christi Smith and accepted as a premise for his argument that Walker had said that Mr. Griffin had shot him, when the witnesses to the dying declaration disagreed as to whether Walker implicated Mr. Griffin or his codefendant. *Id.*

It was not necessary for the Court of Appeals to defer to the State Court factfinding. That factfinding was incomplete, ignoring the motion to sever and its significance for the rest of the factfinding process. As a consequence, having mistakenly rejected the fact that Goldenhersh knew enough about the possibility of the present-but- innocent defense, the State Court's narrow focus on evaluating counsel's performance at trial caused a total

failure of findings of fact as to whether trial counsel abrogated his duty toward Mr. Griffin and as to whether this dereliction had specific adverse impact on counsel's performance. Thus the difference in the approaches of the State Court and Court of Appeals analyses centers on what trial counsel knew about Mr. Griffin's possible defenses and whether, having particularized knowledge, counsel was obligated to act to make sure Mr. Griffin was protected from proceeding to trial represented by counsel laboring under a conflict. The State Court decision narrowly focused on whether Mr. Griffin's testimony that he told Marvin Goldenhersh he was present was credible and whether Goldenhersh's trial performance was adversely affected by the joint representation. The Court of Appeals first considered what duty Mr. Goldenhersh had ***ab initio*** to protect Mr. Griffin's interests. The Court of Appeals also specified instances in choosing defenses and at trial in which counsel's performance was adversely affected by the conflict of interest. Had the State Court considered all the relevant evidence and framed the issue properly, it would have recognized the conflict of interest and the adverse impact the actual conflict had on Goldenhersh's performance. The Illinois Supreme Court nevertheless reached the unreasonable conclusion that trial counsel had no conflict.

If it is determined that the AEDPA applies to non-capital cases pending in the federal courts and cannot be waived by the State's inaction, that finding should have no negative implications for the outcome of this case. The Court of Appeals correctly interpreted the facts in light of the evidence and reached the correct conclusion of law, in accord with ***Cuyler***, that Mr. Griffin was denied the effective assistance of counsel due to counsel's representation of two clients with divergent interests and that the actual conflict adversely affected his trial. Because the State Court's decision was based on its unreasonable determination of the facts, there is no reason to grant the petition for a *writ of certiorari*.

CONCLUSION

For these reasons, the *petition for writ of certiorari* should be denied.

Respectfully submitted,

CHARLES M. SCHIEDEL
Deputy Defender
Office of the State Appellate Defender
Supreme Court Unit
400 South Ninth Street, Suite 101
P.O. Box 5720
Springfield, IL 62705-5720
(217) 782-1989
Counsel of Record

DANIEL D. YUHAS
Deputy Defender
Office of the State Appellate Defender
Fourth Judicial District
400 S. 9th Street, Suite 102
P.O. Box 5750
Springfield, IL 62705-5750
(217) 782-3654

COUNSEL FOR RESPONDENT

ARDEN J. LANG
Assistant Defender

OF COUNSEL

NO. 96-1041

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

NOTICE AND PROOF OF SERVICE

TO: Honorable William K. Suter
Clerk of the Supreme Court of
the United States
1 First Street N.E.
Washington, D.C. 20543

Ms. Arleen C. Anderson
Assistant Attorney General
Counsel of Record
100 West Randolph, Suite 12
Chicago, IL 60601
(312) 814-2235

State's Attorneys Appellate Prosecutor
725 South Second Street
Springfield, IL 62704
(217) 782-7086

Mr. Robert Haida
State's Attorney
St. Clair County Courthouse
10 Public Square
Belleville, IL 62220
(618) 277-6600

Mr. Lee Otis Griffin
308 North Illinois Street
Belleville, IL 62220

Please take notice that I have mailed the original and ten copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari and Motion for Leave to Proceed *In Forma Pauperis* in the above-captioned case to the Clerk of the U. S. Supreme Court and that I am serving the Attorney General with three copies, and the State's Attorney, SAAP, and Respondent with one copy by depositing the copies in the U.S. Mail, in Springfield, Illinois, with sufficient first class prepaid postage and addressed as indicated above on this 3rd day of February, 1997.

CHARLES M. SCHIEDEL
Deputy Defender

Subscribed and sworn to
before me on this 3rd
day of February, 1997.

NOTARY PUBLIC

OFFICIAL SEAL
EVELYN A. EDWARDS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-6-99

NO. 96-1041

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD D. McVICAR, WARDEN, Petitioner

vs.

LEE OTIS GRIFFIN, Respondent

AFFIDAVIT

I, CHARLES M. SCHIEDEL, state on oath:

1. I am a member of the Bar of the United States Supreme Court.

2. I am counsel of record for respondent, Lee Otis Griffin.

3. At 4:30 p.m., on February 3, 1997 I deposited in the United States mail in Springfield, Illinois, with first class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court, the original and ten copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari in the above-entitled cause.

4. The Respondent's Brief in Opposition to Petition for Writ of Certiorari is due to be filed February 2, 1997.

5. FURTHER AFFIANT SAYETH NOT.

Charles M. Schiedel

CHARLES M. SCHIEDEL
Assistant Defender
COUNSEL FOR RESPONDENT

Subscribed and sworn to
before me on this 3rd day
of February 1997.

Evelyn A Edwards
NOTARY PUBLIC

OFFICIAL SEAL
EVELYN A. EDWARDS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-6-99

OFFICE OF THE STATE APPELLATE DEFENDER
FOURTH JUDICIAL DISTRICT

400 SOUTH NINTH STREET – SUITE 102
P.O. BOX 5750
SPRINGFIELD, ILLINOIS 62705-5750
TELEPHONE: (217) 782-3654

DANIEL D. YUHAS
DEPUTY DEFENDER

KAREN MUNOZ
JEFFREY D. FOUST
GARY R. PETERSON
LAWRENCE BAPST
LAWRENCE J. ESSIG
JUDITH L. LIBBY
ARDEN J. LANG
MARTIN J. RYAN
MICHELE A. KNAPP
ELIZABETH D. CADDICK
KHALIL COX
JOHN M. McCARTHY
DUANE E. SCHUSTER
JANIEEN R. TARRANCE
ASSISTANT DEFENDERS

RECEIVED
FEB 5 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

February 3, 1997

Honorable William K. Suter
Clerk of the Supreme Court
of the United States
1 First Street N.E.
Washington, D.C. 20543

RE: RICHARD D. McVICAR, WARDEN, PETITIONER V. LEE OTIS GRIFFIN, RESPONDENT

Dear Mr. Suter:

I have enclosed the Motion for Leave to Proceed *In Forma Pauperis* and Respondent's Brief in Opposition to Petition for *Writ of Certiorari* in the above-entitled cause. I have also enclosed an Affidavit of mailing.

Sincerely,

Arden J. Lang

ARDEN J. LANG
Assistant Defender

AJL:ee

Enclosures

Printed on Recycled Paper

(3)

Supreme Court, U.S.
FILED
FEB 11 1997
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No. 96-1041

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD D. McVICAR, WARDEN,
Petitioner,

v.

LEE OTIS GRIFFIN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

ARLEEN C. ANDERSON
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2235
Counsel for Petitioner

Printed by Authority of the State of Illinois (P.O. 36723—55—2-10-97)

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I.	
BECAUSE AN ARGUMENT GROUNDED IN § 2254(D) GOES TO A LIMITATION ON THE FEDERAL COURTS' POWER TO ADJUDICATE, IT CANNOT BE WAIVED BY THE STATE	1
II.	
THE STATE COURT DECISION BELOW WAS NOT BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS	4
CONCLUSION	6
APPENDIX	*infra*

TABLE OF AUTHORITIES

Cases: PAGE(S)

Boria v. Keane, 90 F.3d 36 (2d Cir. 1996) 1

Cuyler v. Sullivan, 446 U.S. 335 (1980) 6

Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996) . 1

Felker v. Turpin, 116 S.Ct. 2333 (1996) 3

Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted in part*, 136 L.Ed.2d 643 (1977) 1, 3, 4

People v. Griffin, 109 Ill.2d 293, 487 N.E.2d 599 (1985) 4

Sumner v. Mata, 449 U.S. 539 (1981) 1

Terrell v. Maggio, 693 F.2d 591 (5th Cir. 1982) .. 2

Other:

Fed. R. Civ. P. 12(h)(3) 2

Larry W. Yackle, *Symposium: State Prisoner Use of Federal Habeas Corpus Procedures: The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393 (1983) 2

ARGUMENT

I.

BECAUSE AN ARGUMENT GROUNDED IN § 2254(D) GOES TO A LIMITATION ON THE FEDERAL COURTS' POWER TO ADJUDICATE, IT CANNOT BE WAIVED BY THE STATE

The central strategy of respondent's brief in opposition to the petition for certiorari is to disavow the significance of footnote two in this Court's decision in *Sumner v. Mata*, 449 U.S. 539 (1981), offering the superficial explanation for the majority's refusal in that case to find that the State abandoned its right to rely on § 2254(d), simply that the "[Supreme] Court had the benefit of the full briefing and argument from the parties on the § 2254(d) argument."[1] (Opposition, p. 7). Moreover, attempting to ignore

---

[1] Nor can Griffin successfully distinguish this case from *Sumner v. Mata* by arguing that in *Sumner*, the § 2254(d) issue, although not raised in the court of appeals, was raised in the district court, while here, "[u]ntil the Court of Appeals denied rehearing, the State never briefed the matter of AEDPA's applicability to this case." (Opposition, p. 6). From the time the AEDPA was passed on April 24, 1996, until the Court of Appeals decided *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted in part*, 136 L.Ed.2d 643 (1997), on September 12, 1996, the weight of authority from other circuits indicated that the Act was not to apply to pending cases. The Court of Appeals noted as much in *Lindh*: "To leave the ensuing judgment in force—and to leave all of the rules governing primary conduct intact—is not 'retroactive' in the sense *Landgraf* uses that term, and the amended § 2254(d) is therefore presumptively applicable. We respectfully disagree with the contrary conclusions of *Edens v. Hannigan*, 87 F.3d 1109, 1111 n. 1 (10th Cir. 1996), and *Boria v. Keane*, 90 F.3d 36 (2d Cir. 1996)." 96 F.3d at 865. Griffin also overlooks the fact that on the very day the State moved to file *Lindh* as additional authority under Circuit Rule 28(j), 11 days after it was decided, the Court of Appeals entered an order denying rehearing and finding that the State had waived its right to rely on the Act. In other

(Footnote continued on following page)

the plain meaning of then-Justice Rehnquist's language in footnote two,[2] Griffin fallaciously reasons that no conflict between *Sumner* and the case at bar exists because "the passage of AEDPA [Antiterrorism and Effective Death Penalty Act of 1996], and the Court of Appeals' refusal to apply it retroactively in this case, did not remove subject matter jurisdiction from the Court of Appeals or from any other federal court." (Opposition, pp. 5-6).

Unquestionably, footnote two cannot be construed to mean that § 2254(d) removes subject matter jurisdiction from a federal court. Then-Justice Rehnquist was merely explaining that an argument grounded in § 2254(d) goes to a limitation on the federal courts' power to adjudicate and, thus, despite the State having failed to raise it, it can be raised at any time. *See* Fed. R. Civ. P. 12(h)(3); *see also* Larry W. Yackle, *Symposium: State Prisoner Use of Federal Habeas Corpus Procedures: The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L.J. 393, 416-17 (1983).

---

[1] *continued*
words, the State's motion and the Court's order literally "crossed in the mail." Although Judge Flaum would have granted the State's motion to vacate the portion of the Court's order finding waiver, which the State filed when it became aware that its motion to file additional authority and the Court's order had crossed in the mail, the other two judges on the panel voted to deny it.

[2] It should also be noted that respondent's assertion that footnote 2 in *Sumner* has never been cited as authority is incorrect. As one example, Judge Higginbotham from the Court of Appeals for the Fifth Circuit relied on footnote 2 in *Terrell v. Maggio*, 693 F.2d 591, 593 n. 1 (5th Cir. 1982), in addressing a § 2254(d) issue which had never been raised by the State.

The principle that Congress has placed limitations on the federal courts' authority to grant habeas corpus relief to state prisoners has just recently been reaffirmed. In *Felker v. Turpin*, 116 S.Ct. 2333 (1996), although concluding that the Act does not deprive it of jurisdiction to entertain original habeas petitions, this Court found that:

> Our *authority* to grant habeas relief to state prisoners is *limited* by § 2254, which specifies the conditions under which such relief may be granted to "a person in custody pursuant to the judgment of a State court. [citation omitted]. Several sections of the Act impose new requirements for the granting of relief under this section, and they therefore inform our authority to grant such relief as well.

116 S.Ct. at 2339 (emphasis added).

Amended § 2254(d)(1) undeniably places a limitation on federal courts' power to grant collateral relief to a state prisoner. In the Court of Appeals' own words in *Lindh*:

> A conflict between decisions of the Seventh Circuit and the Supreme Court of Wisconsin would not *authorize* issuance of a writ under §2254(d)(1). State courts must knuckle under to decisions of the Supreme Court, but not of this court.

96 F.3d at 869 (emphasis added). The Court of Appeals continued:

> We must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts—when it is, in the standard phrase, a "mixed question of law and fact"—§ 2254(d)(1) *restricts* the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application of" the law.

Id. at 870 (emphasis added).

Although the Court of Appeals expressly recognized in *Lindh* that amended § 2254(d) places limititations a federal court's power to adjudicate, it nonetheless found that the State could abandon its right to rely on it. 96 F.3d at 865. This erroneous interpretation of the law must be corrected.

II.

THE STATE COURT DECISION BELOW WAS NOT BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS

Griffin argues that even if this Court upholds the holding in *Lindh* that the AEDPA does in fact apply to cases pending on the date of enactment, but further finds that the State cannot abandon its right to rely on amended § 2254(d) because it restricts federal courts' power to adjudicate, it is unnecessary to remand this cause because Griffin "will still prevail under amended § 2254(d)(2) because the State Court decision, *People v. Griffin*, 109 Ill.2d 293, 487 N.E.2d 599 (1985), is based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." (Opposition, p. 9). Specifically, he asserts that the Illinois Supreme Court's determination of the facts was unreasonable because it omitted from the "calculus" the fact that trial counsel filed motions to sever his clients' cases before trial. This, according to Griffin, demonstrates that "Goldenhersh [his counsel] knew Mr. Griffin [sic] admissions about being at the scene contradicted the alibi defense Goldenhersh expected to mount [and] Goldenhersh did not want these admissions to adversely affect the fortunes of his other client, Jimmy Smith." (Opposition, p. 10).

Because Griffin himself has put this particular spin on trial counsel's filing of motions to sever on behalf of both

of his clients does not mean that the Illinois Supreme Court's failure to engage in a similar leap in inference amounts to an unreasonable determination of the facts. There is no indication from the severance hearing transcript, (excerpt attached hereto in the appendix), that trial counsel moved for a severance because he knew that Griffin had made statements indicating that he had been at the murder scene only as an innocent bystander, and that such statements would contradict Jimmy Smith's alibi defense. On the contrary, the only necessary conclusions to be drawn from the transcript is that counsel was worried about the effect Smith's substantial criminal record might have on Griffin, (App. 6-7), and about certain statements against interest which Griffin allegedly made to police which might in turn affect Smith. For example, trial counsel indicated to the trial judge that the prosecution allegedly had evidence of Griffin making a phone call while at the police station telling a friend to report his car stolen.[3] (App. 6). Another example counsel cited was the alleged statement of a police officer indicating that he had told Griffin, "Boy, you're sure in a lot of trouble," and Griffin responded, "I know it." (App. 6). Counsel further indicated, without elaborating, that "[t]here are a few other examples like that, not direct, not relating directly to the alleged shooting, but a [sic] very very damaging, devastating evidence, perhaps as to the one defendant, and clearly inadmissible as to the other." (App. 6). Clearly, this last ambiguous statement need not have compelled the Illinois Supreme Court to conclude that trial counsel knew Griffin might possibly have a viable innocent bystander defense, the raising of which would be out of the question if he desired to continue to represent both defendants.

---

[3] Griffin's car was identified as having been used in connection with the crime.

Moreover, even if it could be concluded that counsel was made aware from sources other than Griffin that Griffin told his first lawyer he had been an innocent bystander at the crime scene, yet continued to maintain to counsel now that he and Smith had a joint alibi,[4] that certainly would not mean that a federal court would be authorized to grant habeas relief based on such a showing. In order to secure a writ, Griffin must show that, applying *Cuyler v. Sullivan*, 446 U.S. 335 (1980) to the facts of his case, an actual conflict of interest adversely affected his trial counsel's performance. As Judge Flaum concluded in his dissenting opinion in the case below, that Mr. Griffin cannot do.

CONCLUSION

For the reasons set out above and those set forth in the petition for a writ of certiorari, the Court should grant the petition to review the decision of the United States Court of Appeals.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

ARLEEN C. ANDERSON
Assistant Attorney General
Counsel of Record
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2235

Counsel for Petitioner

[4] The majority in the case at bar in fact presumed that.

APPENDIX

IN THE CIRCUIT COURT
TWENTIETH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY

THE PEOPLE OF THE STATE OF ILLINOIS	)	
vs.	)	No. 81-CF-116
LEE OTIS GRIFFIN & JIMMY LEE SMITH	)	

REPORT OF PROCEEDINGS

Before the HON. JOHN J. HOBAN

MOTIONS

May 29, 1981

APPEARANCES:

Mr. John Baricevic
State's Attorney

On Behalf of the People;

Mr. Marvin Goldenhersh
Private Counsel

On behalf of the Defendants.

Debra M. Musielak, CSR, CM
Official Court Reporter

THE COURT: Which motion do you wish to take up first, Mr. Goldenhersh?

MR. GOLDENHERSH: Motion for severance in behalf, first in behalf of Lee Griffin.

THE COURT: All right.

MR. GOLDENHERSH: Do you want me to stand during this presentation, your Honor?

THE COURT: No, as old as you are, you can sit down.

MR. GOLDENHERSH: Your Honor, there are two main reasons for this severance. The one thing, this defendant Lee Griffin has no record whatsoever, to my knowledge anyway, unless—that's one of the things I haven't been furnished on Discovery, Hoover reports, but I don't believe that Lee Griffin has any record.

THE COURT: Well, let's clear that up right now. Has Lee Griffin any kind of a record?

MR. BARICEVIC: Judge, I suspect he does, and I will have to—

THE COURT: Well, if he does, he should have—

MR. GOLDENHERSH: I don't think he does, your Honor. And I think it is important to know one way or the other.

THE COURT: That's right. You are entitled to know.

MR. GOLDENHERSH: While you are looking, I don't know, we don't have Hoover reports on other State witnesses, in fact on the primarily State witness, who is this fellow Kellick, whose case they are continuing so he won't have another conviction, which I question the propriety of that.

MR. BARICEVIC: Judge, I'm prepared to answer that, but I think we ought to do one motion at a time.

MR. GOLDENHERSH: I thought I'd get in a few licks.

MR. BARICEVIC: Judge, apparently we don't have any record on—wait a minute. Which guy are we on?

MR. GOLDENHERSH: We are on a motion of severance for Lee Griffin.

MR. BARICEVIC: Okay Judge. We do—we have received a Department of Law Enforcement sheet on Lee Otis Griffin, which I don't see the date on it. At any arrest, it shows five arrests and two convictions, both misdemeanors.

THE COURT: Well, no criminal record.

MR. GOLDENHERSH: No criminal record, then I was right about that. Now, on the other hand, the co-defendant, Jimmy Smith, I understand again, I haven't received the Discovery, has a substantial record, just in fact I know he has been in the penitentiary for almost the last 10 or 11 years, and very serious question, it is doubtful that he would testify at all. In trying these two people together in the same trial, would put a no record person with a person with a substantial record. There is no charge of any conspiracy here, and I feel that it is a disadvantage, and detriment to Griffin that there would be no way to overcome.

In addition to that, we have asked the State to specifically set out to us, and I think Rule 412 would require this under the circumstances. Rule 412 requires that they give us their witnesses, not that they give us a bunch of police reports, many of which are not too coherent, and others of which are not even legible. And we have alleged in the motion that there are suggestions in those police reports that admissions against interest and so forth. And of course admission against interests by one defendant, you can cover that with an Instruction. You can tell the jury that they shouldn't be held against the other defendant. But as a practical matter, that is of very very little curative effect of this extreme detriment and unfairness that's imposed upon a co-defendant in a situation like that. And I believe that for those two main reasons, the fact that the one fellow has no record at all, and the other one has a substantial record, and the fact that there are

those complications with regard to admissions, that it would be extremely unfair for those people to be tried together. Now, so that the Court could evaluate the extent of those admissions, we have asked, in fact I talked to Charlie Hamilton about it, and it was my impression that he would furnish it, that he would put before the Court exactly what admissions we are talking about. If it is necessary to weigh the extent of the admissions, and how damaging they would be.

THE COURT: If they are merely admissions, they can be cured by an Instruction, and we cure them every day by Instruction. I know it is not the ideal method of taking care of such a situation, I know that the mind of a juror is not like a blackboard where you can erase from it something that has been said, but I think generally our jurors today are sophisticated enough that they will follow the Instructions. We had the same situation yesterday where there were statements made, admissions by each party, and they were stricken, deleted, the names—they were written admissions, and the names of the co-defendants were deleted from each others admissions. And we gave them an Instruction. So I would deny it on that grounds. I think it can be cured. They will be properly instructed to the effect that any admissions against interest pertain only to the defendant who made the admissions against interest, and not to anyone else, and can't be considered against anyone else.

MR. GOLDENHERSH: Well your Honor, let me—may I interrupt for just one second. This is an alibi defense, and of course it can't be possibly cured in that kind of a situation. I mean if they are going to disbelieve an alibi of one defendant, because of such admissions, there is no way in the world that can be cured as to the other defendant.

THE COURT: Well I don't know how one—

MR. GOLDENHERSH: They were either in this together, or they weren't.

THE COURT: Well, we are not going to permit into evidence any admission by one defendant that he and the other defendant—in other words, any admission by Lee Otis Griffin that he and Jimmy Smith were in there together. We are not going to permit him to say that.

MR. GOLDENHERSH: Well, what I'm saying is though that clearly is hearsay. It would be strictly hearsay as to the co-defendant. There is no question about that.

THE COURT: That's right.

MR. GOLDENHERSH: Whether it is an admission against interest, against another defendant. Now what I'm saying is in an alibi defense, it is devastating. There is no way you can cure it. It is—maybe in some situations where it wouldn't, where it would make a difference if they didn't hold it against—

THE COURT: Let me ask you. Are you saying that the defendant who made admissions against interest now comes up with an alibi defense?

MR. GOLDENHERSH: There is no admission that they were involved in this together. Those are other little things. I don't know what they are going to prove, and I ask that they advise us what they are going to prove so that there would be an intelligent evaluation of it.

THE COURT: Did Hamilton tell you that he would do it?

MR. GOLDENHERSH: Well, I believe he indicated that he would come up with that, yes. So that there could be an intelligent evaluation of it.

THE COURT: Well, that would be unusual. It isn't required by our laws of Discovery, criminal Discovery.

MR. GOLDENHERSH: No, that's true.

MR. BARICEVIC: Judge, I deny that we—we have had discussions with Mr. Goldenhersh on that. I've had those

same discussions with Mr. Hamilton, and we have agreed that we will give Mr. Goldenhersh everything he is entitled to by the rules of Discovery, and nothing more.

MR. GOLDENHERSH: Yeah. All right. Well, but whether they have agreed to it or not, there has been no admissions by anybody that they have been engaged in this event. But there are a number of things throughout the Discovery which are clearly, which clearly could have been provable as admissions against interest against one of the defendants clearly inadmissible as to the other one, and an alibi.

THE COURT: Specify some of those instances, and I will rule on them.

MR. GOLDENHERSH: Well for example, they have not—they have got Lee Griffin—let me think of this for just a moment. They have got Griffin allegedly having made a phone call while he was in the police station telling a friend of his to report his car stolen. You know, I don't know if they are going to try to prove this kind of thing or not, but if they do try to prove it, the only basis of it could be an admission against interest, against Lee Griffin, and it wouldn't be applicable at all to Jimmy Smith. This is not a stolen car case, as I say, this is a Murder with an alibi defense.

Another example is that one of the policemen says that, "Boy, you're sure in a lot of trouble," and Griffin says, "I know it." Well that I assume could be provable against Griffin as an admission against interest, clearly no admissible as to the co-defendant Jimmy Smith. There are a few other examples like that, not direct, not relating directly to the alleged shooting, but a very very damaging, devastating evidence, perhaps as to the one defendant, and clearly inadmissible as to the other. In this alibi defense, it is very detrimental, devastating, and no way to cure it by Instruction, and that together with the fact that the

one guy has the substantial record and the other one has none whatsoever.

THE COURT: Well, the fact that he has a record, that wouldn't be grounds at all. It would be a matter of strategy on your part, whether you wish to put him on the stand or not.

MR. GOLDENHERSH: Right.

THE COURT: But it wouldn't be grounds for granting a severance merely because he had a record, otherwise he would be—we would be unable to try half the lawsuits we try.

MR. GOLDENHERSH: The bottom line is can they get a fair trial together. I don't think there is any way in the world they can.

THE COURT: I think they can, and I can assure you of this. I don't think any defendant has gone out of this court saying that the Court was derelict in its duty in seeing that they got a fair trial. I think the State has criticized me several times, to me they have been critical. I don't say they go out in the hallways—I don't know what they say out there, in out there I don't give a damn. In any event, they have been critical that I have given the defendant too much leeway. But I think a man is entitled to a fair trial and impartial trial. And he will certainly get it in here, and that wouldn't be grounds in my opinion for a severance. None of that has been considered by our Appellate and Supreme Courts, and we have, as you well know, our Appellate and Supreme Courts have been very protective of the rights of the defendants in the State of Illinois.

MR. GOLDENHERSH: Right.

THE COURT: No, if that's the grounds, and I guess those would be the grounds on each of those two defendants, on each of their motions to sever, would it not?

MR. GOLDENHERSH: Yes sir, basically they are the same.

THE COURT: Then I would deny your motions to sever. What I am particularly interested in, if there is some Discovery they haven't furnished you with, I want to know that.